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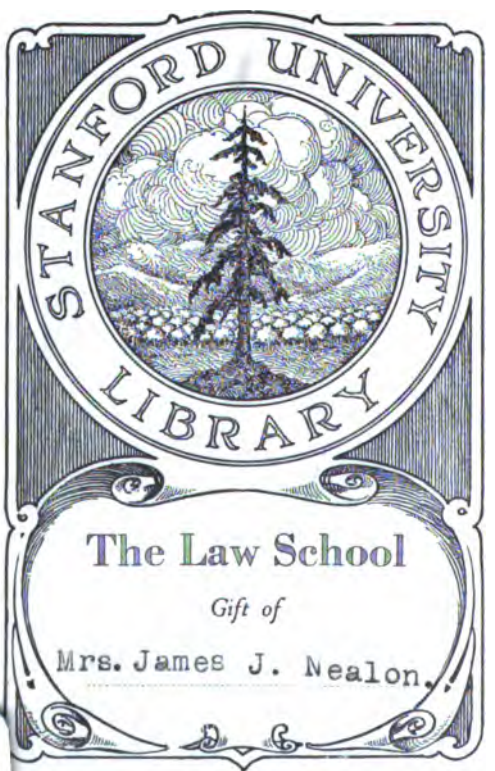
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Frank J. Burke

HORNBOOK CASE SERIES

ILLUSTRATIVE CASES

ON

BAILMENTS AND CARRIERS

BY ARMISTEAD M. DOBIE

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AUTHOR OF DOBIE ON BAILMENTS AND CARRIERS

A COMPANION BOOK
TO
DOBIE ON BAILMENTS AND CARRIERS

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HORNBOOK CASES

ON

BAILMENTS AND CARRIERS

PART I

BAILMENTS

DEFINITION AND CLASSIFICATION OF BAILMENTS

I. Classification of Bailments [1]

COGGS v. BERNARD.[2]

(Court of Queen's Bench, 1703. 2 Ld. Raymond, 909; 1 Smith Leading Cases, 199.)

HOLT, C. J.[3] The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely; and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labor, so that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case; and because some of the books make the action lie upon the reward, and some upon the

[1] For discussion of principles, see Dobie, Bailm. & Carr. §§ 2, 4–7. See, also, § 29.

[2] This case is reproduced at such length owing to its striking historical importance.

[3] The opinion of Holt, C. J., is given in full. The statement of facts and the opinions of Justices Gould and Powell are omitted.

promise, at first I made a great question whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And there are six sorts of bailments. The *first* sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum,* and it is that sort of bailment which is mentioned in Southcote's case. The *second* sort is, when goods or chattels that are useful are lent a friend *gratis,* to be used by him; and this is called *commodatum,* because the thing is to be restored in *specie.* The *third* sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio,* and the lender is called *locator,* and the borrower *conductor.* The *fourth* sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, *vadium,* and in English, a pawn or a pledge. The *fifth* sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The *sixth* sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them *gratis,* without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust.

As to the *first* sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. *He is not answerable if they are stole without any fault in him, neither will a common neglect* make him chargeable, but he *must be guilty of some gross neglect.* There is, I confess, a great authority against me; where it is held that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted to keep them only as you will keep your own. But my Lord Coke has improved the case in his report of it; for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason or justice, in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law upon which it is grounded;

and therefore it is incumbent upon them that advance this doctrine to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter; and by them show, that there never was any such resolution given before Southcote's case. The 29 Ass. 28 is the first case in the books upon that learning; and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 Edw. 2, Fitzh. Detinue 59, where goods are locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, it was held that the bailee should not answer for the goods; that case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest; for the bailee has as little power over them when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4. 40. b. was but a debate at bar; for Danby was but a counsel then; though he had been chief justice in the beginning of Edw. 4, yet he was removed, and restored again upon the restitution of Hen. 6, as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genney, for his client, said the contrary. The case in 3 Hen. 7. 4. is but a sudden opinion; and that but by half the court; and yet, that is the only ground for this opinion of my Lord Coke which besides he has improved. But the practice has been always at Guildhall, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since, against the opinion of that case. When I read Southcote's case heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first; and came not to be of this opinion till I had well considered and digested that matter. Though, I must confess, reason is strong against the case, to charge a man for doing such a friendly act for his friend; but so far is the law from being so unreasonable that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for the keeping them as he keeps his own is an argument of his honesty. *A fortiori,* he shall not be charged where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3, c. 2, 99, b. '*J. S. apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpae autem nomine non tenetur, scilicet desidiae vel negligentiae, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriae fatuitati hoc debet imputare.*' As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk,

and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author; but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes further; for there it is said: *'Ex eo solo tenetur, si quid dolo commiserit: culpae autem nomine, id est, desidiae ac negligentiae, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit quia qui negligenti amico rem custodiendam tradit, non ei, sed suae facilitati, id imputare debet.'* So that a bailee is not chargeable without an apparent gross neglect. And *if there is such a gross neglect,* it *is looked upon as an evidence of* fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words; yet even that won't charge him with all sorts of neglects; for if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrongdoers. 3 Cro. 214, acc. 2 Cro. 425, acc., upon a promise for quiet enjoyment. And if a promise will not charge a man against wrongdoers, when put in writing, it is hard it should do it more so when spoken. Doct. and Stud. 130 is in point, that though a bailee do promise to redeliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrongdoer. So that there is neither sufficient reason nor authority to support the opinion in Southcote's case. If the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect.

As to the *second* sort of bailment, viz. *commodatum,* or lending *gratis,* the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable: as, if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton *ubi supra:* his words are: *'Is autem cui res aliqua utenda datur, re obligatur, quae commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata.*

Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius cam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatum domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel praedonum, vel naufragio, amiserit, non est dubium quin ad rei restitutionem teneatur.' I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care: but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the *third* sort of bailment, *scilicet locatio,* or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired. And here again I must recur to my old author, fol. 62, b.: *'Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet, quam si praestiterit et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberit, nisi talem adhibuerit, de qua superius dictum est.'* From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the *fourth* sort of bailment, viz. *vadium,* or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge; and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them: but then she must do it at her peril, for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and, as such, is not liable to be used.

And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat. As to the second point, Bracton, 99. b. gives you the answer: *'Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis [ei] in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si praestiterit et rem casu amiserit, securus esse possit, nec impedietur creditum petere.'* In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and Southcote's case. But, indeed, the reason given in Southcote's case, is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them: because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the *fifth* sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a *delivery to* one *that exercises a public employment*, or a delivery *to a private person*. First, if it be to a *person of the first sort*, and he is to have a *reward, he is bound to answer for the goods at all events*. And this is the case of the common carrier, common hoyman, master of a ship, &c.: which case of a master of a ship was first adjudged, 26 Car. 2, in the case of Mors v. Slue, Raym. 220, 1 Vent. 190, 238. The law charges this person thus entrusted to carry goods, against all events, but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves,

&c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors, and such like. And though a bailie is to have a reward for his management, yet he is only to do the best he can; and if he be robbed, &c., it is a good account. And the reason of his being a servant, is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust; farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the *sixth* sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3. 100, it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his commentaries upon Justinian, lib. 3. tit. 27, 684, defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. Bracton, *ubi supra*, says "*Contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus et mandatis.*" I don't find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because, in such a case, a neglect is a deceit to the bailor. For, when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretense of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 Roll. Abr. 10. 2 Hen. 7. 11. a strong case to this matter. There the case was an action against a man who had

undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if, after, he does not look to them, an action lies. For here is his own act, viz., his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the *owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management*. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. 6. 49. and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. 4. 33. this difference is clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court—what if he had built the house unskilfully?—and it is agreed in that case an action would have lain. There has been a question made, If I deliver goods to A., and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed; and, according to that reversal, there was judgment afterwards entered for the defendant in the like case, Yelv. 128. But those cases were grumbled at; and the reversal of that judgment in Yelv. 4, was said by the judges to be a bad resolution; and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667. Tr. 21 Jac. 1. in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of Mors v. Slue, was drawn by the greatest drawer in England in that time; and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid

for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point; but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

II. Bailment and Sale Distinguished [4]

SATTLER v. HALLOCK et al.

(Court of Appeals of New York, 1899. 160 N. Y. 291, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. Rep. 686.)

Action by Theodore Sattler, assignee, against George W. Hallock and others, for conversion. From a judgment of the appellate division affirming a judgment entered on a verdict in favor of defendants and an order denying a new trial (15 App. Div. 500, 44 N. Y. Supp. 543), plaintiff appeals.

MARTIN, J. On the 21st day of February, 1895, 25 farmers, residents of the town of Smithville, L. I., were the owners of a building or premises used as a pickle factory, situated in that town. On that day they entered into a written agreement with the firm of John A. Meierdiercks & Sons, in relation to the production, manufacture, and sale of pickles, sauerkraut, and other like products. So far as material to the question involved, the contract was substantially as follows: The parties agreed to organize a responsible company or corporation for the purpose of conducting or aiding in the production and manufacture of the articles referred to in the contract. It then provided that the farmers were to prepare and deliver to the plaintiff's assignors, at the factory, pickles, cabbage, dill, etc., to be raised upon an acreage which was given, and at prices stated therein. If the building proved insufficient, the farmers were to provide an additional one at a cost not to exceed $300, to be paid by the assignors and deducted from the net profits at the end of the season, they guarantying that such profits should amount to at least that sum. If they were more than the cost of the building, then the farmers were to receive 20 per cent. thereof, to be divided between them according to the amount of produce furnished by each. The assignors were to take the pickles, cabbage, and other produce, pay the prices named at the times and in the manner stated, furnish the labor, machinery, bar-

[4] For discussion of principles, see Doble, Bailm. & Carr. § 3.

rels, tanks, salt, spices, and other necessary material, and pay the freight and cartage. These expenses were to be deducted from the gross receipts of the sales of the pickles, sauerkraut, and other goods so manufactured. A list was then given of the number of acres of each kind of produce which was to be furnished by each of the 25 farmers named. To receive products at the factory, the assignors were to furnish one man and the farmers another, who were to attend to their reception, and decide all matters of dispute in relation to them. The representative of the farmers was to be given full and complete data of all the produce delivered, and all barrels, salt, spices, and utensils furnished, and all the goods of every description received and shipped by the assignors, so as to show the gross receipts and expenses for the year. The agreement then provides: "The manufacture and sale of all the products of the Long Island Farmers' Co. shall be done by J. A. Meierdiercks & Sons. * * * It is hereby agreed by the undersigned, of the Long Island Farmers' Company, that at any time should the business of the Long Island Farmers' Company cease, and the property, including buildings, utensils, bbls., etc., be sold or bartered, the members of the Long Island Farmers' Company, other than J. A. Meierdiercks & Sons, guaranty to J. A. Meierdiercks & Sons 35 per cent. of the amount realized." This agreement was signed by the 25 farmers mentioned, and by the plaintiff's assignors.

Subsequently, the Long Island Farmers' Company was organized in accordance with the contract. By-laws were passed, and the defendants were elected as its managing officers. Soon after the execution of the contract, the plaintiff's assignors went to the factory, proceeded to manufacture the produce which was delivered under it, and continued that business until they made a general assignment to the plaintiff. The keys of the factory were retained by, and continued in the possession of, a representative of the farmers, who, after the produce was delivered at the factory and manufactured, shipped it to various purchasers. During the continuance of this business, the executive officers of the farmers' company, or some of them, were usually present at the factory, and engaged in looking after the business there transacted. They gave directions, passed judgment upon the quality of the produce, and were often consulted by the assignors' representative in regard to affairs connected with the business. Although the manufactured products were sold by the plaintiff's assignors, they were billed, "J. A. Meierdiercks & Sons, Agents Long Island Farmers' Company." These bills were sent, and checks drawn to the order of the company were received, when the assignors requested the committee of the company to give them a power of attorney to indorse them, which it refused to do. On the 17th of September, 1896, the firm of John A. Meierdiercks & Sons made a general assignment to the plaintiff for the benefit of its creditors. Subsequently the plaintiff went to the factory at Smithtown, and de-

manded all the products, manufactured and unmanufactured, claiming that they were owned by the assignors at the time of the assignment, and were a part of the assets of that firm. With this demand the managers of the company refused to comply, claiming that by the terms of the agreement the company and the farmers it represented were the lawful owners of such products. This action was to recover their value at the factory at the time of the assignment, upon the ground that the defendants had wrongfully converted them to their own use. The defendants alleged title in the Long Island Farmers' Company, and that they, as its representatives, were entitled to the possession of the property.

Thus is it obvious that the single question involved is whether, under the contract between the parties, the title to the property in suit vested in the plaintiff's assignors and was transferred to him by the assignment, or whether it remained in the farmers' company or the farmers furnishing it. On the trial, the court held that the contract imported a sale, but submitted to the jury the question whether, under the facts and circumstances proved, including the acts of the parties, the contract had been substantially altered, so that the title rested in the defendants or the company or persons they represented. The jury found for the defendants. The appellate division, however, held that the evidence was not sufficient to justify the submission of that question to the jury, but that the contract between the parties was one of bailment or partnership, and not of sale, and hence the plaintiff was not entitled to recover, and judgment for the defendants was properly rendered. With this situation, it is obvious that the determination of the courts below can be sustained only in case the transaction between the parties was a bailment or joint enterprise. If it was a bailment, manifestly the defendants were entitled to retain the possession of the property. If it was a joint enterprise, the plaintiff could not recover in an action for the conversion of the property, as the defendants were entitled to its possession, as against the plaintiff, until the matters arising under the contract were adjusted. We fully agree with the learned appellate division that there was no evidence to justify the trial court in submitting to the jury the question of an alteration or modification of the original agreement. Therefore the real question we are called upon to decide is whether the agreement of the parties imported a sale of the property to the plaintiff's assignors. If it did, and the title passed, then the plaintiff is entitled to recover; if not, then the judgment is right, and should be affirmed. In the construction of contracts, where there is no ambiguity, it is the duty of the court to determine their meaning. Moreover, where the terms and language of the contract are not disputed, its legal effect is a question of law, to be determined by the court. It is always the duty of a court, in construing a written instrument, if possible, to ascertain the intention of the parties; and, in order to determine its proper construction, resort must be had to the instrument as a whole,

and effect must be given to every clause and part thereof, when it can be done without violence. Ripley v. Larmouth, 56 Barb. 21.

With these principles in mind, we approach the question whether, under the provisions of this contract, the plaintiff's assignors were bailees of the property, or whether the contract was one of purchase and sale. One of the distinctions between a bailment and a sale is correctly pointed out in the dissenting opinion of Bronson, C. J., in Mallory v. Willis, 4 N. Y. 76, 85, as follows: "When the identical thing delivered, though in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed." Foster v. Pettibone, 7 N. Y. 435, 57 Am. Dec. 530. There are, however, other principles applicable to the question. Thus, when property in an unmanufactured state is delivered by one person to another, upon an agreement that it should be manufactured or improved by his labor and skill, and when thus improved in value should be divided in certain proportions between the respective parties, it constitutes a bailment, and the original owner retains his exclusive title to the property until the contract is completely executed, although the labor to be performed by the bailee may be equal or even greater in value than that of the property when received by him. Beardsley, J., in Gregory v. Stryker, 2 Denio, 631. Again, the relation is that of bailor and bailee, where the property is thus delivered to be manufactured or improved, and afterwards there is to be a sale and a return or a division of the proceeds. Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215. In Hyde v. Cookson, 21 Barb. 92, there was a written agreement between the plaintiffs and one Osborn in relation to tanning a quantity of hides. The hides were to be furnished by the plaintiffs on a commission of 5 per cent. for buying and 6 per cent. for selling the leather. Osborn was to take the hides to his tannery, manufacture them into hemlock sole leather, and return it to the plaintiffs, who were to sell it in their discretion. When sold, the account was to be made up, and the net proceeds of the sales, after deducting the costs of hides, commissions, interest, insurance, and other expenses, were to be the profit or loss to accrue to Osborn in full for tanning the hides; and it was held that this was not a contract of sale, but of bailment, and that the title remained in the plaintiffs. In Pierce v. Schenck, 3 Hill, 28, logs were delivered at a sawmill under a contract with the person running the mill that he would saw them into boards, and that each party should have one-half. It was held that the transaction was a bailment; that the bailor retained his general property in the logs until they were all manufactured in pursuance of the contract; and that, as between the parties, the bailee acquired no interest in any of the boards manufactured by mere part performance within the time. In Mallory v. Willis, 4 N. Y. 76, the plaintiffs agreed to deliver merchantable wheat at a flour mill carried on by the defendant to be manufactured into flour. The defendant agreed to deliver 196 pounds of superfine flour, packed

in barrels to be furnished by the plaintiffs, for every 4 bushels and 15 pounds of wheat. He was to be paid 16 cents per barrel, and 2 cents extra in case the plaintiffs made 1 shilling net profit on each barrel of flour. The defendant was to guaranty the inspection. The plaintiffs were to have the offals or feed, which the defendant was to store until sold. This court held in that case that the contract imported a bailment, and not a sale. The doctrine of that case was indorsed in Foster v. Pettibone, 7 N. Y. 433, 57 Am. Dec. 530. In Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. Rep. 534, the parties entered into a contract by which the plaintiff agreed to manufacture for the defendant 1,000 pairs of pruning shears, to be in all respects like a sample furnished, the defendant to furnish the rough castings for the handles, and the plaintiff to furnish the blades. It was held that the contract was one of bailment, and not of purchase and sale, so that the title to the shears manufactured was at all times in the defendant.

Applying these principles to the contract under consideration, we think it is quite obvious that it was one of bailment, and not of purchase and sale. Under its terms, the parties represented by the defendants were to furnish certain specified amounts of farm produce, which was to be delivered at a factory owned by them, and manufactured into pickles, sauerkraut, and other similar articles. It was to be received jointly by a representative of the plaintiff's assignors and a representative of the farmers. The plaintiff's assignors were to pay the prices named for the produce furnished, to furnish the labor, machinery, and materials, such as salt, spices, barrels, and other necessary articles and utensils, and to pay the freight and cartage. The amount thus expended was to be deducted from the gross receipts of the sales of the articles manufactured, and the representative of the farmers was to be furnished with a full account of all of the transactions connected with the business. The manufacture and sale of the products of the Long Island Farmers' Company were to be done and made by the plaintiff's assignors, and the net proceeds were to be divided by paying 20 per cent. to the farmers or for their benefit, and the assignors to have 80 per cent. Thus the produce was to be furnished by the persons represented by the defendants, was to be manufactured by the plaintiff's assignors, to be sold as the products of the Long Island Farmers' Company, and the net profits divided. The raw material, which was owned by parties the defendants represent, was delivered to the plaintiff's assignors, to be improved by their labor and skill. It was then to be sold, and the net value divided in the proportions named. So that, clearly within the principle of the Gregory and other kindred cases, the owners of the produce thus delivered retained their title to the property until the contract had been completely executed, and this without regard to the value of the labor performed upon it by the plaintiff's assignors as such bailees. We

think, when this entire contract is examined and understood, it clearly imports a bailment, and not a sale.

It is also quite manifest that the parties understood such to be the nature of the agreement between them. This is shown by the facts that the property, after it was manufactured, was shipped from the factory by the company; that the plaintiff's assignors, acting under this contract, in selling the manufactured produce, caused the bills to be sent to purchasers in the name of the company, with their names thereon as agents; that checks were taken therefor drawn to the order of the company, in accordance with the bills sent; that the assignors asked for a power of attorney authorizing them to indorse the same; that the representatives of the farmers were present at the factory, and that they gave directions as to the management of the business there carried on. All these facts tend to show with convincing certainty that the plaintiff's assignors, as well as the other parties to the contract, understood it to be one of bailment, where the property was to be furnished by the latter, improved by the former, and the net profits divided. If this contract is to be regarded as somewhat indefinite or ambiguous, we may resort to the surrounding facts and circumstances as they existed when it was made to aid us in its interpretation, and also consider the practical construction which the parties have given it. Its interpretation by them is a consideration of importance. As was said by Swayne, J., in Insurance Co. v. Dutcher, 95 U. S. 269, 273 (24 L. Ed. 410): "The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done." Woolsey v. Funke, 121 N. Y. 87, 24 N. E. 191. It follows from the conclusion we have reached as to the character of the contract and the relation existing between the parties that the judgment must be affirmed, as the agreement between them constituted a bailment of the property in question, and the plaintiff's assignors acquired no such title as would enable them to maintain an action for its conversion. The judgment should be affirmed, with costs. All concur. Judgment affirmed.

JAMES et al. v. PLANK.

(Supreme Court of Ohio, 1891. 48 Ohio St. 255, 26 N. E. 1107.)

The defendant in error brought his action in the court of common pleas of Logan county to recover the value of a quantity of wheat, which, in his petition, he alleged was sold by him as executor, on or about the 18th day of August, 1886, to the plaintiffs in error, who were partners in trade engaged in the business of purchasing, shipping, and selling wheat. Issue was joined by answer and reply. The principal

question to be determined was whether the delivery of the wheat by Plank was a sale or a bailment, the claim of the defendant below being that the transaction was a bailment, and that the wheat was, on the 26th day of August following, without fault on their part, burned, except a small portion, of the value of $36.16, which amount had been tendered. At the conclusion of the evidence, the court instructed the jury that under the undisputed facts the plaintiff was entitled to recover the value of the wheat at the time of delivery, with interest, and a verdict for the plaintiff was found accordingly. Judgment was rendered upon the verdict, which was affirmed by the circuit court, and to reverse these judgments this proceeding in error is brought.

SPEAR, J.[5] (after stating the facts as above). The question is, did the court of common pleas err in directing a verdict for the plaintiff below? If, as was assumed by that court, the undisputed evidence established that the transaction was a sale, then the direction was right, but if the whole evidence left a fair question as to whether it was a sale or a bailment, then the question should have been submitted to the jury. It was shown by the evidence that the wheat was delivered by an employé of the plaintiff, at the warehouse of the defendants, on the 17th and 18th days of August, 1886, and received by a clerk or foreman employed at the warehouse, who, as the loads came, issued receipts in substance like the following:

"No. 1721. De Graff, O., August 17, 1886.

"James & Neer.

"Received of J. C. Plank, (administrator,) load of wheat, 11 bushels, 5 pounds.

"Not transferable. Present this at office.

"J. H. McKinnie, Weigher."

The wheat, when deposited, was mixed with other like wheat in the warehouse, some belonging to the defendants, and some to others, for whom it had been received in store. On the 26th day of August, 1886, a fire occurred, which consumed the warehouse, and nearly all the wheat there at the time. The fire was without fault on the part of the defendants. At that time none of the receipts had been presented at the office. Shortly after the fire Plank demanded of James & Neer pay for all the wheat delivered, which was refused. They, however, tendered $36.16, as his share of damaged wheat which had been sold after the fire. Within the previous year Plank had delivered to the defendants at the same warehouse from eleven to twelve hundred bushels of wheat, for which he took weigher's receipts in form similar to the copy given, which he subsequently presented at the office, and received in exchange storage receipts, a copy of one of which is as follows:

[5] Part of the opinion is omitted.

"James & Neer,
"Dealers in Grain & Seeds.

"No. 240. De Graff, O., January 5, 1886.

"Received of Joseph C. Plank, four hundred and fifty-two bushels and 35 pounds of wheat, (452 35 100 bushels.) Subject to the following rules: Storage free until June 1, 1886. One cent per bushel per month, or any part thereafter. All grains stored at owner's risk. We will not be responsible for loss or damage in any way. Grain taken out of house by owners, five cents per bushel, and usual storage.

"James & Neer."

This wheat was subsequently sold to the defendants. The evidence further tended to show that James & Neer were at the time, and had been for several years, engaged in storing wheat as warehousemen, as well as in buying and selling; that they sold and withdrew from the common mass, but never so much but that there was left sufficient to return to each depositor his proper quantity; and that, when the fire occurred, they had in the warehouse between 200 and 300 bushels of wheat in excess of the quantity necessary to satisfy all depositors, including Plank. The evidence further tended to show the existence of a custom of dealing in vogue for many years at that and other warehouses in the neighborhood, of which Plank had knowledge, to the effect that grain deposited in the warehouse, for which weigher's receipts were given, was regarded as grain in store until such receipts were presented at the office, when the owner had the option to exchange the weigher's receipts for a storage receipt, and continue the storage upon the terms specified in that form of receipt, or to sell at the price ruling the day such weigher's receipts were presented; and that the receiving of the wheat and the giving of the weigher's receipts did not constitute a sale of the wheat, but that it remained the property of the depositor until the weigher's receipts were presented at the office, and an election to sell made.

Let us examine and ascertain the effect of this evidence in order to determine the duty of the trial court with respect to it. The naked fact of the delivery of the wheat and the terms of the weigher's receipts are consistent with either a sale or a bailment. It being shown further, however, by plaintiff's evidence, that James & Neer were buyers and sellers only of grain, it might well be claimed that the delivery and the receipts imported a sale. But the added character of warehousemen presented a new question. This question would have been removed, and the plaintiff's claim again sustained, had it appeared that James & Neer appropriated the grain to their own use by shipping, so as not to leave a quantity sufficient to satisfy depositors; for, in such case, it might fairly be presumed that the owner and receiptor had agreed upon a sale to the latter. Besides, while the mere option to elect to treat a bailment as a sale at some future time does not deprive it of its character of a bailment (Colton v. Wise, 7 Ill. App. 395;

Plow Co. v. Porter, 82 Mo. 23; Ledyard v. Hibbard, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474), yet, where the depositary appropriates to his own use more than his proportion of the common mass, the depositor may elect to treat the transaction as a sale, and demand pay for the wheat delivered. So that if at all times James & Neer left enough to return to each depositor, including Plank, his proper quantity, the depositors remained tenants in common of the mixed mass, each entitled to such proportion as the quantity placed there by him bore to the whole mass, and Plank, if a depositor originally, would remain such; because the mere fact that the warehousemen mixed the wheat of all of like quality in one common mass, and shipped and sold, from time to time, from the mass, their proportion only, would not work a change in the ownership of the wheat, and it would follow that the fact of mingling and of such shipping and sale would not determine that the transaction was a sale rather than a bailment. Inglebright v. Hammond, 19 Ohio, 337, 53 Am. Dec. 430; Chase v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623; O'Dell v. Leyda, 46 Ohio St. 244, 20 N. E. 472; Rice v. Nixon, 97 Ind. 97, 49 Am. Rep. 430. No doubt whatever exists that the warehouseman may become a tenant in common like any other depositor, and may be permitted to enjoy the same right of severance without affecting the title of his co-tenants. Sexton v. Graham, 53 Iowa, 181, 4 N. W. 1090. So that further proof was necessary in order to ascertain to which class the transaction belonged.

No one will doubt that the parties were competent to make a contract either of sale or of bailment. And the parties having failed to make either directly, by spoken words or in writing, the circumstances surrounding the transaction and the parties at the time were to be resorted to in order to ascertain the real character of the business done. So, evidence having been given tending to show that the defendants were warehousemen as well as buyers of grain, if a custom of trade prevailed in the community, certain, definite, and uniform, and so notorious that it might be presumed to have been known to the plaintiff, throwing light on the understanding of the parties, and tending to show in which capacity the defendants received the wheat, that was competent to be considered. Ledyard v. Hibbard, supra. Such custom might give color to the otherwise doubtful acts of the parties, so as to aid in arriving at their understanding, and it was necessary to ascertain that understanding in order to determine the legal effect of the transaction between them. This is the precise purpose and office of proof of a custom. Inglebright v. Hammond, supra. It in no way can be said to change the law. On the contrary, it may aid in determining the law.

The trial court assumed that, upon the undisputed facts, a sale was conclusively shown, and that a question of law only remained. In this we think the court erred. Upon the whole evidence intelligent

minds might reach a different conclusion, and wherever that state of of the evidence exists it presents a case for the jury, under proper instructions. If the jury should find, from the evidence, that the understanding between the parties was that James & Neer were to mingle the wheat received of Plank with other wheat, and sell and ship at their pleasure, and that the direction in the weigher's receipts to "present this at office" was for the purpose only of indicating to the holder where he could get his pay, or, if the understanding was that they were to mingle the wheat with other wheat of like kind and sell only their own proportion, keeping enough for all depositors, and yet, in disregard of this, they actually did sell at their pleasure, not leaving enough on hand for depositors, then the verdict for the plaintiff, as rendered, would have been justified. But if, on the other hand, the jury should be satisfied from the evidence that the custom, as claimed by defendants, actually existed, was known to plaintiff, and, from it and other facts appearing, that the understanding was that, though the wheat might be mingled with other wheat belonging in part to depositors and in part to defendants, yet defendants were to sell from the common mass, from time to time, their proportion only, leaving sufficient on hand to satisfy all depositors, and the defendants observed this understanding; and especially if, in addition to the foregoing, they found, further, that the distinct understanding of the parties was, by virtue of said custom, that the wheat was to be regarded as in store until Plank should elect to make a sale of it,—then, it appearing that no demand for the pay had been made by presentation of receipts at the office, or otherwise, before the fire, the jury would have been justified in finding for the defendants. * * * Judgment reversed.

THE GENERAL PRINCIPLES COMMON TO ALL BAILMENTS

I. Infant Bailees [1]

CHURCHILL v. WHITE.

(Supreme Court of Nebraska, 1899. 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64.)

NORVAL, J.[2] This was an action by George M. White against Howard Churchill to recover damages to plaintiff's buggy, alleged to have been caused by the wrongful act of the defendant. From a judgment for $60, entered on a verdict for plaintiff, the defendant has prosecuted this error proceeding.

The first assignment of error challenges the sufficiency of the petition filed in the court below, and upon which the cause was tried. Plaintiff, for a cause of action, alleges, in substance and effect, that plaintiff is engaged in the livery business at Clay Center, furnishing horses, harness, buggies, etc., for hire to those who may desire the same; that the defendant is a minor of the age of 19 years, residing with his father near the town; that on October 23, 1894, defendant hired from plaintiff a livery rig, consisting of a span of horses, a set of harness, and a two-seated covered buggy, to go four or five miles immediately south of Clay Center, to a dance at the residence of one A. R. Baker, and agreed to, and did, pay plaintiff, as use for said team, harness, and buggy, the sum of $1.50; that defendant, after obtaining possession of said rig, drove the same to the town of Harvard, situate 2½ miles west and 6½ miles north of Clay Center; thence, after obtaining or receiving other passengers, he drove to said Baker's residence, where he remained a few minutes, and drove the rig, with five passengers, directly west 2¾ miles, thence north 11½ miles, to Harvard, and thence to Clay Center; that the defendant, while said rig was in his possession, and being driven out of the line of the route from Clay Center to the place of the dance, and on the return trip from Baker's to the town of Harvard, permitted the buggy to upset, and the team to run several rods, thereby breaking the buggy in numerous places, described with great particularity in the petition, cutting and bruising the heel of one of the horses; that the team was overdriven; and that defendant drove the rig in a direction, and used the same for a purpose, different than that for which

[1] For discussion of principles, see Doble, Bailm. & Carr. § 8.

[2] Part of the opinion is omitted.

it was hired; by reason thereof, plaintiff has been damaged in the sum of $100.

The contention of defendant below (plaintiff herein) is that the action is founded upon a contract with an infant, and therefore no recovery against him can be had. While, ordinarily, infants are not liable on their contracts, except for necessaries, they are answerable for their torts. In 10 Am. & Eng. Enc. Law, 668, 669, the rule is stated thus: "An infant is liable for all injuries to property or person wrongfully committed by him. His privilege of infancy is given to him as a shield, and not as a sword, and it cannot be used for protection against the consequences of wrongful acts; for, where civil injuries are committed by force, the intent of the perpetrator is not regarded. * * * Although an infant is liable for his torts, he is not liable for the tortious consequences of his breach of contract. Whether the form of the action be contract or tort, the infant cannot be held for a mere violation of contract, but the contract cannot avail if the infant goes beyond the scope of it. The tort must be a distinct and substantive wrong in itself, even though it grow out of a contract, to make the infant liable. The contract must be generally put in proof to support the action, but that is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract, and not because the contract is otherwise involved." The text is abundantly sustained by judicial decisions.

Although no recovery can be had against an infant for a breach of contract, the principle is well recognized, and has been often applied, that he is liable for a tort committed by him, notwithstanding it may have arisen out of, or in some way may have been connected with, a contract. In Fitts v. Hall, 9 N. H. 441, Parker, C. J., observed: "The principle to be deduced from these authorities seems to be that, if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject-matter of it, the infant cannot be charged for this breach of his promise or contract by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, willful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable." In Freeman v. Boland, 14 R. I. 39, 51 Am. Rep. 340, it was held that where an infant hires a horse and buggy of a keeper of a livery stable to go to a designated place, and drives beyond the place or in another direction, and injures the horse, the infant is liable therefor. To the same effect are Homer v. Thwing, 3 Pick. (Mass.) 492; Rotch v. Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Fish v. Ferris, 3 E. D. Smith (N. Y.) 567. In Towne v. Wiley, 23 Vt. 355, 56 Am. Dec. 85, an infant who hired a horse to drive to an agreed place, 23 miles distant, returned by a circuitous route, which nearly doubled the distance, and stopped

at a house on the way, leaving the horse standing out of doors during the night, without food, and it died from overdriving and exposure. It was decided that the infant was liable in damages, by reason of his having departed from the object of his bailment. Redfield, J., in delivering the unanimous opinion of the court, said: "So long as the defendant kept within the terms of the bailment, his infancy was a protection to him, whether he neglected to take proper care of the horse or to drive him moderately; but, when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable as much as if he had taken the horse in the first instance without permission. And this is no hardship; for the infant as well knows that he is perpetrating a positive and substantial wrong when he hires a horse for one purpose, and puts him to another, as he does when he takes another's property by way of trespass." This case was cited by the same court, and the principle applied, in Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519. Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189, was an action against an infant to recover damages for having so carelessly and immoderately driven plaintiff's horse, which he had hired, as to cause the animal's death. The plea was infancy. Bellows, C. J., in passing upon the question, employed the language following: "We think, then, that the doctrine is well established that an infant bailee of a horse is liable for any positive and willful tort done to the animal distinct from a mere breach of contract, as by driving to a place other than the one for which he is hired, refusing to return him on demand after the time has expired, willfully beating him to death, and the like; so, if he willfully and intentionally drive him at such an immoderate speed as to seriously endanger his life, knowing that it will do so. * * * In all these cases it may be urged that the law implies a promise on the part of the bailee to drive the horse only to the appointed place, to return him at the end of the journey, not to abuse him or drive him immoderately, and that a failure in either respect is merely a breach of contract. So, it might be said that the law would raise a promise not to kill him; and yet no one would fail to see that to kill him willfully would be a positive act of trespass, for which an infant should be liable the same as if there were no contract. * * * When the infant stipulates for ordinary skill and care in the use of the thing bailed, but fails from want of skill and experience, and not from any wrongful intent, it is in accordance with the policy of the law that his privilege based upon his want of capacity to make and fully understand such contracts should shield him. * * * But when, on the other hand, the infant wholly departs from his character of bailee, and, by some positive act, willfully destroys or injures the thing bailed, the act is in its nature essentially a tort, the same as if there had been no bailment, even if assumpsit might be maintained in case of an adult, on a promise to return the thing safely."

In the case in hand the petition discloses, and the evidence adduced by plaintiff on the trial tends strongly to establish, that the tort of the defendant was not committed under the contract, but by absolutely abandoning or disregarding it, or in departing from the terms thereof. The petition is not framed upon the theory of a breach of contract, but for the tort, and contains sufficient averments to constitute a cause of action, notwithstanding the infancy of the defendant.

The seventh instruction is criticised, which reads as follows: "You are instructed, gentlemen, that, so far as this case is concerned, the infancy of the defendant does not affect the liability. The rule that one who hires property of this kind for one purpose, and uses it for another or different purpose from that contemplated by the parties in the contract of hiring, is liable for any harm that may happen it while he is so using it, applies to minors as well as to adults." This instruction harmonizes with the views which we have already expressed, and is within the doctrine announced in the cases cited above. This portion of the charge did not withdraw from the consideration of the jury whether or not the defendant used the team and buggy for a purpose different from that contemplated by the contract of hiring. Such question was fairly submitted to the jury by other instructions, which expressly advised the jury there could be no recovery if the defendant did not hire the property for a specific and designated trip or route of travel, or to drive to a specific place. Under the theory of neither party was the infancy of the defendant material or an important consideration, since it could not influence the decision either way. If the team was hired to drive to Mr. Baker's, as plaintiff insisted was the agreement of the parties, then it was driven nearly 50 miles, instead of 10 miles, the distance from Clay Center to Baker's, and return, by the usual route of travel. * * *

No reversible error being disclosed, the judgment is accordingly affirmed.

II. Estoppel of Bailee to Deny Bailor's Title [3]

SIMPSON v. WRENN.

(Supreme Court of Illinois, 1869. 50 Ill. 222, 99 Am. Dec. 511.)

WALKER, J. This was an action of replevin, brought by appellant before a justice of the peace of Logan county, against appellee, to recover a double-barreled shot-gun. A trial was had resulting in favor of appellee, and the case was removed to the Circuit Court of Logan county by appeal. The case was again tried by the court and a jury,

[3] For discussion of principles, see Dobie, Bailm. & Carr. § 14. Besides the case under this heading, see, also, Davis v. Donohoe-Kelly Banking Co., post, p. 29.

resulting as it had before the justice of the peace. A motion for a new trial was entered, but overruled by the court, and a judgment rendered on the verdict; to reverse which this appeal is prosecuted.

It appears from the evidence in the record, that appellant was a lieutenant in company B of the Second Illinois Cavalry; that when encamped near Baton Rouge, in Louisiana, he was ordered, with a portion of the men, to attack a squad of the enemy; that in doing so, his men captured a lot of arms, and that when they came to be turned over to the provost marshal, that officer gave the gun in controversy to appellant. Appellee claims that he had purchased the gun of another member of the company, who was on the expedition, before it was taken to the provost marshal.

Appellant swears that he brought the gun home and had it stocked, and that appellee requested the loan of the gun, when appellant gave him an order on Fossett, who had it in his possession, and that appellee thus obtained possession of the gun, and refused to return it to him when demanded.

Appellee swears that he did not borrow the gun, but that appellant gave it to him on his claiming to own it. He also introduced evidence tending to prove that he purchased the gun before it was taken to the office of the provost marshal.

Appellant asked, but the court refused to give, these instructions:

"The court instructs the jury, on behalf of the plaintiff, that if they believe from the evidence that the defendant (Wrenn) borrowed the gun in controversy from the plaintiff (Simpson), and afterwards refused to deliver up possession of the gun upon demand being made by the plaintiff, then the right to the possession is in the plaintiff, and the jury will so find."

"The court further instructs the jury, that if they believe from the evidence that the defendant (Wrenn) borrowed the gun in controversy from the plaintiff (Simpson), the defendant then became the bailee of the plaintiff, and cannot set up title to the gun in himself in this action, and if the jury further find that the defendant refused to deliver up possession of the gun after demand being made by Simpson, then they will find for the plaintiff."

The whole contest in this case turns upon the refusal to give these instructions, and in giving the reverse of the propositions they contain. It is urged that a bailee cannot set up property in himself to defeat a recovery in replevin by his bailor. The proposition is undeniably true, that a bailee of property may recover it of his bailor, if he can show that he is lawfully entitled to the possession and use under a valid agreement, although the latter may be the owner. The action of replevin may be maintained by the owner against any person wrongfully in possession, as in such case, the right of property carries with it the right of possession. But, on the contrary, a person having a special property in the chattel in controversy, entitling him to the posses-

sion, may recover it in this form of action against any one, even the owner. The statute has provided for both classes of cases.

In this case, it is contended that appellee obtained possession of the gun by borrowing it, with a promise for its return, and thereby admitted either that appellant was the owner, or was at least entitled, as against himself, to the possession; that if he borrowed the property, he is estopped from setting up title against his bailor while that relation exists between them; that he must first restore possession before he can raise the question of ownership in himself.

It is said by Story, in his work on Bailments (section 266): "Even if the lender is not the owner of the thing, the borrower must ordinarily restore it to him, and has no right to set up the title of a mere stranger against him, for the lender has, by his contract a right to be reinstated in his possession." He, however lays down the rule, that he will be discharged from liability to restore, if the property is taken from him by legal recovery by the owner.

If a borrower cannot set up title in another to exonerate himself from a return of the property to the lender, why should he be permitted to set up property in himself, to excuse him from a performance of his agreement to restore the property? It would seem that in both cases the reason is the same. A person claiming to own property, should not be permitted to get possession by such a fraud, and then refuse to restore it because he claims to own it. This, in many cases, would give him an undue advantage, as it would impose the burden of proving ownership on the lender, by a preponderance of evidence, while, had it remained in his possession, the burden would have been on the opposite party. We are, therefore, of the opinion, that if appellee borrowed the gun, he should not be permitted to set up title in himself until he has restored it to appellant.

In Brusley v. Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423, it was held, that where the owner of property gave a receipt for it to an officer who had seized it under process, when sued for it by the officer, he could not set up title in himself until he first restored the property to the officer.

In this case, the evidence as to the loan was conflicting, and it should have been fairly left to the jury by proper instructions. The instructions given for appellee took that question from the jury, while those asked by the appellant would have left it for their determination. These instructions asked by appellant should, therefore, have been given.

The judgment of the court below must be reversed, and the cause remanded. Judgment reversed.

III. Exposing Bailee to Danger without Warning [4]

COPELAND v. DRAPER.

(Supreme Judicial Court of Massachusetts, 1893. 157 Mass. 558, 32 N. E. 944, 19 L. R. A. 283, and note, 34 Am. St. Rep. 314.)

Action by George L. Copeland against Horace Draper to recover damages for personal injuries. A verdict was rendered for defendant, by direction of the court, and, at the request of both parties, the trial judge reported the case for determination by the supreme judicial court. Judgment entered on the verdict.

At the trial before a jury the plaintiff introduced evidence tending to show that he was a police officer of Boston; that, three or four weeks prior to the time when the plaintiff received the injuries hereinafter mentioned, the defendant, who was a livery stable keeper, furnished for hire to the city of Boston a horse to be used by the mounted patrolmen of Boston; that the horse was examined and tried at the defendant's stable by one of the mounted police officers of Boston, and selected by said officer, and taken for use by the city of Boston; that for several weeks thereafter the horse was ridden by this officer, who testified at the trial that the horse was free from all faults, and in every way suitable for the purpose for which it was hired; that the plaintiff, acting in the due discharge of his duty, mounted the horse and rode it towards the defendant's stable; that while the plaintiff was so riding the horse, and while he was in the exercise of due care, the horse became restive and uncontrollable, shook its head, bolted, and ran violently upon a sidewalk, threw the plaintiff, and fell upon him, breaking the plaintiff's leg, and otherwise injuring him; that the plaintiff had had experience in riding and managing horses before the injury; that the horse had been ridden by other patrolmen, and had not shown any symptoms of viciousness or bad habits, or defects in any way; that there was a scar in the mouth of the horse, which scar "looked as if caused by a cut." There was no further evidence concerning the scar. The plaintiff testified, on cross-examination, that he thought the horse, at the time of the accident, must have had a fit, or blind staggers, or something of that kind.

At the close of the plaintiff's evidence, the defendant requested the court to rule that, on all the evidence, the plaintiff could not recover. In reply to a question put by the court, the counsel for the plaintiff stated that there was no evidence upon which it could be found by the jury that the defendant, prior to the accident, knew, or by the exercise of reasonable care or diligence could have known or discovered, that

[4] For discussion of principles, see Doble, Bailm. & Carr. § 15.

the horse was as described in the declaration. The plaintiff claimed, and requested the court to rule, that the defendant was bound to furnish a suitable horse, and that if the horse, at the time of the accident, was unmanageable and unsuitable, the defendant was liable to the plaintiff in the action, without regard to the defendant's knowledge or negligence; and that it appearing that the horse was unmanageable at the time of the accident a prima facie case was made out as to the negligence of the defendant. The court declined to rule as requested by the plaintiff, and ruled that, upon all the evidence, the plaintiff could not recover. At the court's direction, the jury returned a verdict for the defendant.

HOLMES, J. Horne v. Meakin, 115 Mass. 326, the case relied on by the plaintiff, only decides that, if a party negligently furnishes an unsuitable horse, it is not a defense that he did not know that this horse was unsuitable. In the case at bar, negligence was excluded by the plaintiff's admission that there was no evidence that the defendant knew, or by the exercise of reasonable care could have known, that the horse was unsuitable, if in fact it was. Therefore in order to recover, the plaintiff must maintain that a livery stable keeper warrants or insures the suitableness of every horse which he lets.

No such liability is imposed on him by the fact that he follows a common calling, any more than it is upon every man who keeps a shop. Even in old times, the exercise of a common calling only required a man to show skill in his business. Fitzh. Nat. Brev. 94, D; Norris v. Staps, Hob. 210b, 211; 3 Bl. Comm. 164; Rex v. Kilderby, 1 Wms. Saund. 311, 312, note 2. Common carriers were insurers, not because they had a common calling, but because they were bailees, coupled with certain gradual changes in the law, not material here.

If it should be sought to charge the defendant for the horse as for a dangerous animal, the liability for a horse on that ground, apart from bailment, is confined to cases where the owner has notice of the dangerous tendency. Com. v. Pierce, 138 Mass. 165, 179, 52 Am. Rep. 264; Dickson v. McCoy, 39 N. Y. 400, 403. See, also, Hawks v. Locke, 139 Mass. 205, 208, 1 N. E. 543, 52 Am. Rep. 702. The suggestion has been made, following Mr. Justice Story's statement of the doctrine of Pothier, that bailors for hire generally warrant the suitableness of the thing let (Harrington v. Snyder, 3 Barb. [N. Y.] 380, 381; Story, Bailm. §§ 383, 390); but the common law in general applies the principle of caveat emptor when the hirer has examined the article (Cutter v. Hamlen, 147 Mass. 471, 475, 18 N. E. 397, 1 L. R. A. 429. See, further, Hawks v. Locke, ubi supra; MacCarthy v. Young, 6 Hurl. & N. 329).

The supposed warranty, if it existed, could not be placed on any of the foregoing considerations, but would have to stand on the analogy of carriers of passengers, taking their liability in the strictest form in which it ever has been taken. There have been intimations, if not

decisions, in favor of such a view with regard to vehicles let for the known purpose of carrying passengers (Jones v. Page, 15 Law T. [N. S.] 619; Leach v. French, 69 Me. 389, 392, 31 Am. Rep. 296; Harrington v. Snyder, 3 Barb. [N. Y.] 380; Kissam v. Jones, 56 Hun, 432, 434, 10 N. Y. Supp. 94. Compare Francis v. Cockrell, L. R. 5 Q. B. 501, 503; Fowler v. Lock, L. R. 7 C. P. 272, L. R. 9 C. P. 751, note, L. R. 10 C. P. 90); but an opposite decision was reached in Hadley v. Cross, 34 Vt. 586, and in this commonwealth even carriers of passengers do not warrant their vehicles, and are not liable if wholly free from negligence (Ingalls v. Bills, 9 Metc. [Mass.] 1, 43 Am. Dec. 346; White v. Railroad Co., 136 Mass. 321, 324; Readhead v. Railway Co., L. R. 2 Q. B. 412, L. R. 4 Q. B. 379). It follows, a fortiori, that one who lets a horse does not warrant that it is free from defects which he does not know of, and could not have discovered by the exercise of due care. See Story, Bailm. § 391a; Edw. Bailm. § 373.

Judgment on the verdict.

IV. Presumption of Negligence from Loss or Injury[5]

HUNTER v. RICKE BROS. et al.

(Supreme Court of Iowa, 1905. 127 Iowa, 108, 102 N. W. 826.)

Action to recover the value of a team of horses destroyed by fire while in the possession of defendants as bailees for hire. At the close of all the evidence there was an instructed verdict in favor of defendants, and a judgment against plaintiff for costs. Plaintiff appeals.

BISHOP, J.[6] At the time of the occurrence in question, defendants were engaged in the conduct of a livery and feed barn for hire. Plaintiff gave his team of horses into the custody of defendants to be cared for overnight in said barn, and during the night the same were destroyed by a fire which consumed the barn and its contents.

1. Plaintiff bases his action wholly upon the theory that the destruction of his property was the result of negligence on the part of defendants, the allegation of the petition being that defendants failed to exercise ordinary care to protect the property from danger by fire. * * *

2. The ruling upon the motion to direct a verdict is complained of as error. It will be noticed that the motion was made at the close of all the evidence in the case. Such motion was predicated upon the theory that the burden of proof was with plaintiff to establish the negligence

[5] For discussion of principles, see Doble, Bailm. & Carr. § 17.

[6] Part of the opinion is omitted.

alleged in the petition, and that there has been a failure to make such proof. The record shows that plaintiff rested his case solely upon proof of the bailment, that the property had been destroyed by fire, and a consequent failure on the part of defendants to make return of the property in response to his demand. Defendants on their part introduced evidence to the effect that the fire occurred during the night, and from some unknown cause. Fairly stated, it is the contention of appellant that, having made proof of the fact of bailment, and of the failure to return, there arose a presumption of negligence as matter of law; that in such situation the burden was cast upon defendants to show ordinary care and diligence on their part to protect and preserve the property; and that, having failed in this, as disclosed by the record, they cannot be heard to deny liability. Counsel for appellees, on the other hand, contend that the presumption of negligence, admitting that such arose as contended for, was overcome by proof of the fact that the fire occurred through some unknown cause, and hence was either accidental or incendiary in character.

As the bailment was for hire, and therefore for the mutual benefit of both parties, ordinary care was all that was required at the hands of defendants. Chamberlin v. Cobb, 32 Iowa, 161. Such a bailee cannot be regarded as in any sense an insurer. Seevers v. Gabel, 94 Iowa, 75, 62 N. W. 669, 27 L. R. A. 733, 58 Am. St. Rep. 381. Now that a bailee who fails to account for property intrusted to him may be held liable in some form of action for the value thereof, is general doctrine. And it may be conceded that in the greater weight it is the rule of the cases that, where it appears the property bailed is injured, lost, or destroyed while in the exclusive possession of the bailee, the burden is upon him to overcome the presumption arising therefrom that such occurred through a want of ordinary care on his part. Funkhouser v. Wagner, 62 Ill. 59; Ouderkirk v. Bank, 119 N. Y. 263, 23 N. E. 875; Davis v. Tribune Co., 70 Minn. 95, 72 N. W. 808; 5 Cyc. 217. But the burden of proving negligence does not change. Wiley v. Bondy, 23 Misc. Rep. 658, 52 N. Y. Supp. 68; Thompson on Negligence (2d Ed.) 1051. And when the presumption which obtains contemporaneous with the injury or loss, and which, as in this case, is solely relied upon in chief, is overcome by a showing that such injury or loss occurred through the operation of forces not within the control of the bailee, the case must be at an end, unless he who complains shall go farther, and either disprove the asserted cause of loss, or make it appear that a want of ordinary care on the part of the bailee co-operated with such destroying cause. Dierkson v. Cass Co., etc., 42 Iowa, 38; Willett v. Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684; Schmidt v. Blood, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143, and notes; Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Railway v. Reeves, 10 Wall. 176, 19 L. Ed. 909; Railway v. Railway, 26 Minn. 243, 2 N. W. 700, 37 Am. Rep. 404.

In this view of the law, and taking the situation as here prescribed, we have as the only remaining subject of inquiry whether any evidence was brought forward by plaintiff tending to show negligence on the part of defendants in connection with the origin or progress of fire by which the property was admittedly destroyed. Our reading discloses nothing that would have warranted a submission of the case to the jury. No one pretends to know the origin of the fire, and nothing was shown indicating that it grew out of any cause allowed to exist or set in motion by the defendants. When discovered, the barn was all ablaze, and with it was burned much property of the defendants as well as the property owned by plaintiff.

We conclude that a case of negligence as alleged was not made out, and accordingly the judgment complained of should be, and it is, affirmed.

V. Redelivery of Bailed Goods by the Bailee [7]

DAVIS v. DONOHOE-KELLY BANKING CO.

(Supreme Court of California, 1907. 152 Cal. 282, 92 Pac. 639.)

Action by W. H. Davis, as assignee of the estate of Mary E. Pleasant, an insolvent debtor, against the Donohoe-Kelly Banking Company. From a judgment for defendant, plaintiff appeals.

McFARLAND, J.[8] This action was brought by the assignee in insolvency of Mary E. Pleasant to recover a certain tin box and its contents, or the value thereof, alleged to have been deposited by said Pleasant with defendant in the year 1898. The case was tried without a jury, and the court made findings and rendered judgment for defendant. From the judgment the plaintiff appeals. * * *

The material findings of the court are these: In the year 1896, the said insolvent Pleasant gave to the defendant at its banking house the tin box locked, upon which was painted in large letters the name "Teresa P. Bell," and on a wrapper inclosing the box was written, "Not to be delivered to any one except Mrs. T. P. Bell or Mrs. M. E. Pleasant." It contained jewels and precious stones to the value of $15,000. The defendant kept the box for about three years, no one during that period having demanded it; and on or about April 1, 1899, the said Teresa P. Bell demanded the box of the defendant and the latter then delivered it to said Mrs. Bell. At the time of the delivery of the box to the defendant by Mrs. Pleasant the latter was the servant

[7] For discussion of principles, see Dobie, Bailm. & Carr. § 19.

[8] Parts of the opinion are omitted.

and agent of Mrs. Bell, receiving from her a monthly salary. She had no ownership of the box or its contents, and acted merely as Mrs. Bell's agent. Mrs. Bell was then and ever since has been the sole owner of said box and its contents. Upon the above facts, considered alone, it is obvious that Mrs. Bell had the right to demand the box, and that the defendant was perfectly justified in delivering it to her; and we do not think that certain other facts relied upon by appellant at all affect the obvious conclusion above stated. * * *

Upon the facts last above stated appellant contends that on the filing of the petition in insolvency the said box, as the property of the insolvent, went into the custody of the law; that thereafter defendant had no right to deliver it to Mrs. Bell, and that after the election of the assignee the said property went into the ownership of the assignee, who ever since has been entitled to recover it from defendant. But during that time the box was the property of Mrs. Bell, not the property of the insolvent, and the ownership of Mrs. Bell was not affected by the insolvency proceedings against Mrs. Pleasant. Appellant says the relation between Mrs. Pleasant and the defendant respecting the box was that of bailor and bailee, and invokes the general rule that a bailee cannot dispute the title of his bailor, and that, therefore, defendant cannot show who the real owner was. This general rule is not of universal application, and has its exceptions, even in the usual case where the contract of bailment arises out of the simple fact that the bailor has deposited the property with the bailee and there are no special circumstances or agreements which modify the presumption that the bailor is the owner. In the case at bar, there are not only the facts that Mrs. Pleasant was not the owner of the property, and that Mrs. Bell was such owner; there was on the property itself indicia of Mrs. Bell's ownership, and an express direction that the box be delivered to her on her demand. Therefore, when Mrs. Bell demanded the property, it was her right to receive it, and it was the duty of defendant to deliver it to her under the express terms of the contract upon which defendant received possession. To now compel defendant to pay to the assignee of Mrs. Pleasant $15,000 for property which she never owned, and which defendant had delivered to the true owner under the express provision of the contract upon which defendant had received it, would be a perversion of justice which could be warranted only by some inexorable technical rule which, in our opinion, is not presented in the case at bar. * * *

The judgment appealed from is affirmed.

PARKER v. LOMBARD.

(Supreme Judicial Court of Massachusetts, 1868. 100 Mass. 405.)

Tort against Ammi C. Lombard and John S. Parsons for the conversion of ten bales of cotton. At the trial in the superior court, before Morton, J., a verdict was returned against Parsons, and in favor of Lombard, and the plaintiff alleged exceptions, which were allowed, as follows:

"It appeared in evidence that on July 19, 1866, George H. Frothingham sent the cotton to the warehouse of Parsons, who was then a warehouseman at No. 18 Lewis's Wharf, in Boston, and received a warehouse receipt for it from Parsons's clerk, it being intended that the cotton should remain there for a considerable time on storage. Through the negligence of the clerk, no memorandum of the transaction was ever entered on Parsons's books. On July 21, 1866, Frothingham indorsed the warehouse receipt to the plaintiff, who sent his clerk with it to Parsons, to inquire if he had the cotton therein mentioned on storage; and Parsons replied that he had, and that it would be delivered to nobody unless that receipt was surrendered at the time.

"In October, 1866, Parsons went out of business as a warehouseman, and Lombard hired the warehouse of the Lewis's Wharf Company. At the time when Lombard took possession, the cotton was in the warehouse. Parsons's clerk went over the warehouse with Lombard's clerk, and gave him a memorandum in writing of the names of the owners of the different parcels of merchandise there contained, in which this cotton was by mistake described as the property of Hobbs & Travis, a firm of cotton brokers at Boston; and the cotton was, upon this information, entered upon Lombard's books as the property of Hobbs & Travis. Near the end of June, 1867, the cotton having remained in the warehouse till that time, Lombard, of his own motion, gave notice to Hobbs & Travis to come and take it away. They replied that they had forgotten about it, but said they would attend to it; and on July 2, 1867, they came and took the cotton away. Lombard delivered the cotton to them, and took their receipt for it at the time, and Parsons, having been called as a weigher by Hobbs & Travis, weighed out the cotton as it was delivered.

"It was in the evidence that in depositing goods there is no usage in Boston of taking warehouse receipts, and that in more than half of the cases they are not taken. Lombard had been in the business of a warehouse keeper largely in Boston since 1850. Lombard testified that he never doubted that Hobbs & Travis were the owners of the cotton, or had his suspicions excited upon the subject until the plaintiff came to him in September, 1867; and it was not disputed that he acted in good faith.

"Upon this evidence, the plaintiff contended that the actual delivery by the warehouseman Lombard to Hobbs & Travis, although by mis-

take, and under the supposition that they were the true owners, would render him liable to the plaintiff for a conversion. But the judge ruled otherwise, and directed a verdict in favor of Lombard, on the ground that it was incumbent upon the plaintiff to show negligence in order to charge him as a warehouseman for a conversion; and that the facts above stated were no evidence of any negligence to go to the jury."

HOAR, J. The only point in controversy is, whether there was any evidence of a conversion of the cotton by the defendant Lombard. When he hired the warehouse, the cotton was already stored there, in the possession of Parsons, the preceding lessee of the building. Parsons delivered it into his custody to keep on storage for Hobbs & Travis, who were not the owners, and had no title to it whatever. Lombard kept it as long as he was willing to do so, and then gave notice to Hobbs & Travis to take it away, which they did, he delivering it to them. He had no notice that the plaintiff was the owner, and that he held Parsons's warehouse receipt for the property, until three months afterward.

1. The plaintiff alleges that these facts show a conversion of the cotton, because Lombard was negligent in ascertaining the ownership of it, and there were circumstances which should have put him upon inquiry. But we fail to perceive any evidence of negligence on his part. He had the right to suppose that Parsons knew who were the owners, and that his information from him was correct. It was proved that in more than half the cases a warehouse receipt is not taken when property is left for storage, and there was therefore nothing suspicious in the circumstance that Hobbs & Travis did not produce one. When application was made to them to take the cotton away, they said nothing to lead Lombard to suppose that it was not theirs; but, on the contrary, their answer, "That they had forgotten about it, and would attend to it," conveyed a strong implication that they were the owners.

2. The plaintiff contends that a delivery to the wrong person is in itself a conversion by a bailee. The authorities are numerous to sustain this doctrine; some of them being found in the recent decisions of this court. But we think they are not applicable to the peculiar state of facts which this case discloses. "If one man," said Mr. Justice Buller, "who is intrusted with the goods of another, put them into the hands of a third person contrary to orders, it is a conversion." Syeds v. Hay, 4 T. R. 260. So if the bailee sell the goods, or otherwise assert and exercise acts of ownership adverse to the title of the owner, although innocently, it is a conversion. Coles v. Clark, 3 Cush. 399.

But if the bailee being intrusted with the possession merely, transfers the possession according to the directions of the person from whom he received it, without notice of any better title, and without undertaking to convey any title, this does not appear to have been held any evidence of a conversion. Thus in Strickland v. Barrett, 20 Pick. 415, Brown, who was a mortgagor in possession of certain goods, conspired with

Hill to remove them out of the reach of the mortgagee, and employed the defendant Barrett to assist in removing them; and it was held that Barrett was not liable in trover, unless he knew of the intent to deprive the plaintiff of his property. And where one received a gun as a pledge from a person in possession of it, and restored it to him before any demand by the owner, this was not found to be a conversion. Leonard v. Tidd, 3 Metc. 6. See also Loring v. Mulcahy, 3 Allen, 575.

In the cases cited for the plaintiff, the wrong delivery of goods by a carrier or warehouseman was in violation of his contract, being without authority from the person from whom he had received them. Devereux v. Barclay, 2 B. & Ald. 702. Claflin v. Boston & Lowell R. Co., 7 Allen, 341.

In the case at bar, Lombard received the cotton from Parsons, who was lawfully in possession of it as bailee, with directions to keep it for Hobbs & Travis, and deliver it to them. He strictly complied with his engagement to do so; and had no notice of any other claim of ownership. To deliver it according to Parsons's order was no more unlawful, under these circumstances, than it would have been to return it to Parsons himself. It showed no breach of his contract, nor intent to deprive the plaintiff of his property.

Exceptions overruled.

POWELL v. ROBINSON & LEDYARD.

(Supreme Court of Alabama, 1884. 76 Ala. 423.)

Tried before the Hon. John P. Hubbard.

This action was brought by S. H. Powell against Robinson & Ledyard, warehousemen in the city of Montgomery, to recover damages for their alleged conversion of two bales of cotton, which the plaintiff had stored with them, and which they afterwards surrendered and delivered under a judgment recovered against them by W. H. Merritt. The facts of the case, as agreed on at the trial, are thus stated in the bill of exceptions: "In November, 1883, the plaintiff stored with said defendants, as warehousemen, two bales of cotton, marked S. H. P., for account of plaintiff. On the same day, W. H. Merritt notified defendants that he claimed said cotton as his own, adversely to said Powell; while said Powell notified them, at the same time, that he claimed said cotton adversely to said Merritt. Thereupon, on the same day, defendants notified plaintiff and said Merritt, each, of such claims, by serving upon each of them the notices hereto attached as exhibits, marked A and B. On the 19th December, 1883, said Merritt brought two suits against defendants for said cotton, before Jno. B. Fuller, a justice of the peace in and for said county, and recovered judgments in said suits; and a writ of possession was thereupon issued on said judgments, and placed in the hands of a proper officer, to whom de-

fendants delivered the cotton under said writ. (A copy of the proceedings before said justice of the peace, as Exhibit C, is hereto attached.) Defendants gave no notice to plaintiff of said suits being brought, or that they were pending; and plaintiff had no notice of said suits, or either of them, until after the cotton was delivered as aforesaid. The evidence tended to show that the cotton was the property of the plaintiff, and that it was worth $50 per bale. This was all the evidence; and the court thereupon charged the jury, at the request of the defendants in writing, that they must find for the defendants, if they believed the evidence." The plaintiff excepted to this charge, and took a nonsuit; and he now assigns said charge as error.

CLOPTON, J. The principles which, at common law, govern the relation of bailor and bailee, applicable to this case, are well settled. The bailee can not, in general, dispute the title of his bailor, and his duty, on the termination of the bailment, is to restore the property to the person from whom he received it; and if he delivers it, by negligence or design, to another, who is not entitled to it, it amounts to a conversion, for which he is responsible. Where he has notice that the property does not belong to his principal, a delivery to him will be a conversion, for which the true owner can hold him liable. The bailee has no higher or better right than his bailor, and is not exempted from liability to the true owner, because he holds the property as bailee, claiming no title. In such case, he may refuse to deliver it to his principal, and surrender it to the rightful claimant, but he assumes the burden of establishing a paramount title. Crosswell v. Lehman, Durr & Co., 54 Ala. 363, 25 Am. Rep. 684; Calhoun v. Thompson, 56 Ala. 166, 28 Am. Rep. 754.

When there are adverse claims, and the bailee can not compel them to interplead, he must, at common law, defend himself as well as he may. If he is unwilling to undertake the onus of proving a superior title to his principal, he may retain possession, and await an action by the adverse claimant. On such action being brought, he may give his bailor notice of its pendency, and require him to defend his title. A judgment against the bailee, whether the bailor appears, or refuses to defend after notice, will be a sufficient defense in any subsequent action by the bailor. The rule, that the bailee can not dispute the title of his bailor, does not apply. Cook v. Holt, 48 N. Y. 275; Schoul. Bailm. 69. The judgment, in such a case, is conclusive of the wrongful delivery of possession to the bailee, and of the superiority of the title of the adverse claimant.

In order that a judgment may operate a bar, or an estoppel conclusive on the party sought to be bound, he must have been a party to the suit, or in privity with a party, or have possessed the power of making himself virtually a party in the larger legal sense,—"having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies." Where there is privity of relation, as bailor and bailee, it is sufficient, if the

party voluntarily appears and makes defense, or has an opportunity to present and litigate his claim. McLelland v. Ridgeway, 12 Ala. 482; 1 Greenl. on Ev. § 535; Tarleton & Pollard v. Johnson, 25 Ala. 300, 60 Am. Dec. 515. A judgment of recovery against a bailee, in favor of an adverse claimant, without the bailor appears, and without an opportunity to appear and defend, is res inter alios. To impart sufficiency to the plea of former recovery, it is necessary to aver that the plaintiff had notice of the pendency of the suits brought by the adverse claimant against the defendants.

It is contended that the plea is sufficient, and that the charge of the court should be sustained; it being averred, and shown by the agreed statement of facts, that defendants had complied with the provisions of "An act to protect persons in possession of personal property to which they claim no title, against other persons claiming title thereto adversely to each other." Acts 1880–1, p. 121. The statute provides: "That whenever personal property, in possession of any person claiming no title thereto, is claimed by two other persons asserting title adversely to each other, the person in possession may give notice in writing, to each of the claimants, that he disclaims title, and that the other claimant does claim title to such property, and in such notice demand that such claimants shall litigate between themselves their rights to such property. Such notice shall be a full defense to the person in possession, against any action brought against him by either of said claimants, on account of such property, and against any liability for the loss, injury, or destruction thereof, except when such occurs from a failure to take ordinary care of such property." The legislative intent was to provide for a bailee full protection against the alternative of having to yield to a superior title, and assuming the burden of establishing it, or of incurring the risk of a double recovery. The statute does not abrogate or impair the rights of the bailor, or the duties of the bailee, other than to give to the bailee the right to require the claimants to interplead at law. The bailee is not justified in surrendering the property to either of the claimants. The statute contemplates, that he shall retain possession until there is an interpleader, and deliver possession to the claimant who gives the required bond; and if neither gives the bond, it is his duty to retain the property to abide the result of the suit. The bailee violates his duty, when he delivers the property to the adversary claimant, and thus places his bailor at a disadvantage, and thereby puts himself without the pale of the statutory protection. Such act amounts to a conversion, and prevents the further operation of the statute in his behalf. The policy and effect of the statute will be defeated, if, after giving the notices authorized by the statute, the bailee is allowed to conspire or collude with either claimant, to put the property beyond the reach of the other. The bailee is required to occupy a neutral position, and to keep possession until, under the provisions of the statute, he can deliver the property to the proper party. To enable him to fulfill this duty, the statute provides that the notice,

when properly given, shall be a full defense to any action brought against him by either claimant.

When the defendants gave the notices to the plaintiff, their bailor, and to Merritt, the adverse claimant, they armed themselves with complete protection against a subsequent suit. When Merritt brought the actions against them, it was their duty to have availed themselves of the statutory defense and protection, or, if they did not intend to do so, to have given the plaintiff notice of the suits. Suffering judgments to go by default, and surrendering possession of the cotton thereunder, was negligence, for which they are liable to the plaintiff, unless Merritt was the true owner. By such conduct, they defeated the plaintiff's right of first giving bond, and obtaining possession of the cotton. A surrender of possession, under such circumstances, is the equivalent of a voluntary delivery. The defendants waived the protection afforded by the statute, and are remitted to their common-law liability, and the burden it imposes. The onus is on them to establish the superior title of Merritt.

Reversed and remanded.

ESMAY v. FANNING.

(Supreme Court of New York, 1850. 9 Barb. 176, 5 How. Prac. 228.)

This was an action of trover for a carriage. * * * The complaint stated that the plaintiff, in June, 1846, being possessed of a carriage of the value of $250, at the request of the defendant loaned and delivered the same to the defendant, to be by him safely kept for the plaintiff, and to be by the defendant re-delivered to the plaintiff on request; that the defendant did not safely keep the said carriage for the plaintiff, but converted the same to his the defendant's own use. * * *

The cause was referred to a referee, who reported that he found as facts that about the 1st of June, 1846, the plaintiff loaned to the defendant the carriage in question, to be safely kept by the defendant for the plaintiff, and to be re-delivered to the plaintiff on request; that the defendant had been requested to re-deliver the same to the plaintiff; that the defendant and plaintiff might each use the carriage and the defendant's horses when he chose; that the carriage was obtained by the defendant from the livery stable of George L. Crocker, then of Albany city, and that he kept it safely till about the 1st November, 1846, during which time it was used occasionally by both parties, plaintiff and defendant. That about the first of November, 1846, it was returned by the defendant to the stable of said Crocker; *which return of the carriage to the stable of Crocker, the referee decided was not a re-delivery of the carriage to the plaintiff or his agent.* He therefore, reported in favor of the plaintiff for the value of the carriage at that time, on which judgment was thereupon given, as for a conversion of the carriage.

The defendant appealed from the decision of the referee. * * *

WILLARD, J.[9] The gist of this action is the conversion and deprivation of the plaintiff's property, and not the acquisition of property by the defendant. 3 Barn. & Ald. 685. The general requisites to maintain the action are, property in the plaintiff; actual possession or a right to the immediate possession thereof; and a wrongful conversion by the defendant. White v. Scott, 4 Barb. 56. The plaintiff's title was not disputed in this case. The issue is on the conversion; or, in other words, it is whether the defendant re-delivered the carriage to the plaintiff or his agent, before the commencement of this suit. The plaintiff alleges a refusal to re-deliver it, and the defendant avers that he did re-deliver it. The referee found the fact that the defendant did not re-deliver the carriage to the plaintiff or his agent; and the proof is that Crocker, to whom the defendant did deliver the carriage, in November, 1846, was not, at that time, the agent of the plaintiff, or authorized to receive it. And there is no evidence that the plaintiff ever assented to that delivery. The question, therefore, becomes narrowed down to this: whether a bailee of a chattel is answerable in trover, on showing a delivery to a person not authorized to receive it. In Devereux v. Barclay, 2 Barn. & Ald. 702, it was held that trover will lie for the mis-delivery of goods by a warehouseman, although such mis-delivery was occasioned by mistake only—and this court, in Packard v. Getman, 4 Wend. 613, 21 Am. Dec. 166, held that the same action would lie against a common carrier, who had delivered the goods, by mistake, to the wrong person. The same point was ruled by Lord Kenyon in Youl v. Harbottle, Peake's N. P. Cases, 49, and by the English Common Pleas in Stephenson v. Hart, 4 Bing. 476. If trover will lie against a common carrier or a warehouseman for a mis-delivery, it can, under the like circumstances, be sustained against a bailee for hire, or a gratuitous bailee. It results from the very obligation of his contract, that if he fails to restore the article to the rightful owner, but delivers it to another person, not entitled to receive it, he is guilty of a conversion. Story on Bail. § 414.

The referee found as a fact that the carriage was not re-delivered to the plaintiff, but was delivered to another person having no right to receive it. The evidence detailed in the case warranted that finding, and it can not be disturbed by this court. We think the referee drew the right conclusion from that fact, and justly held the defendant liable for the value of the carriage.

As the parties all lived in the same city, the carriage should have been returned to the plaintiff, unless there was some agreement to the contrary. The fact that the carriage was stored by the plaintiff in Crocker's stable, at the time the defendant first received it, did not authorize him, under a contract to return it to the plaintiff, to deliver it to Crocker, who had ceased to be the plaintiff's agent. The place of delivery of the carriage was the plaintiff's residence. Barns v. Graham, 4

[9] Parts of the statement of facts are omitted.

Cow. 452, 15 Am. Dec. 394; Story on Bail. §§ 257, 261, 265. A delivery elsewhere, without authority, was a conversion. We have not adopted the civil law, which allowed the bailee, in case no place was agreed on, to restore the property to the place from which he took it. Story on Bail. § 117.

It was not necessary in this case to prove a demand and refusal. Had the carriage remained in the defendant's possession, no action could have been maintained by the plaintiff against the defendant, until it had been demanded, and the defendant had neglected or refused to return it. A demand and refusal are not a conversion, but evidence from which it can be inferred. A demand is necessary whenever the goods have come lawfully into the defendant's possession; unless the plaintiff can prove some wrongful act of the defendant in respect of the goods which amounts to an actual conversion. 2 Leigh's N. P. 1483; Bates v. Conklin, 10 Wend. 389; Tompkins v. Haile, 3 Wend. 406. As the delivery of the carriage by the defendant to Crocker instead of the plaintiff amounted to a conversion, proof of a demand and refusal was unnecessary. The testimony of Nichols, therefore, to prove a demand was immaterial, and the decision of the referee, refusing to permit the defendant to prove what he said at the time the demand was made, could have no influence on the result of the cause. Had a demand been necessary, the declaration of the defendant in answer to the demand would have been admissible, as well on the part of the defendant as of the plaintiff. The decision of the referee that a demand and refusal were admitted by the pleadings, whether right or wrong, worked no injury to the defendant.

A wide range was taken on the argument, on the *implied* obligations resulting from the various kinds of bailments, and particularly with reference to the restoring the thing bailed to the bailor. But it seems unnecessary to discuss this subject, in this case, because here there was an *express* agreement to return the property to the plaintiff, on request.

The judgment must be affirmed.

VI. The Termination of the Bailment[10]

BARRINGER v. BURNS.

(Supreme Court of North Carolina, 1891. 108 N. C. 606, 13 S. E. 142.)

MERRIMON, C. J.[11] The parties produced evidence on the trial pertinent to and bearing upon every aspect of the case to which the court directed the attention of the jury. Particularly there was evi-

[10] For discussion of principles, see Dobie, Bailm. & Carr. § 20.

[11] The statement of facts and part of the opinion are omitted.

dence of the plaintiff tending to prove the breaches of the contract alleged by him, to which the third and fourth special instructions complained of as erroneous had reference. The plaintiff alleged that he placed his mare with the defendant, a horse trainer, to be trained for trotting races; that she was to be left in defendant's possession to be trained; that said defendant was to feed her as trained horses should be fed, have her comfortably stabled and well groomed, and then thoroughly trained; and that at the direction of the plaintiff the mare was to be trotted around the race-track for a nominal prize, in the presence of two or three disinterested witnesses, who were to time her with stop watches, in order that it might be discovered what speed she had attained as a racer, and she was then to be delivered to the plaintiff, and he was to sell her, and out of the proceeds of sale to pay the defendant, etc.; that the defendant, "although several times requested to display the speed of said mare as aforesaid, invariably refused so to do, in consequence whereof the plaintiff demanded her surrender from the defendant," etc.; and he further alleged that, in violation of the contract alleged, the defendant had "used and permitted another to drive said mare on other occasions than for training, and for purposes of business or mere pleasure, in which several matters the plaintiff avers the defendant broke his contract," etc. By the terms of the contract thus alleged it was material and important that the defendant, who so had the mare in training, should, upon the demand of the plaintiff, exhibit trials of her speed in the presence of witnesses. He refused, upon repeated demands of the plaintiff, to make such trials, as he was bound to do. If he did, he violated a material provision of the contract as alleged, and the plaintiff became at once entitled to have possession of his mare; and as there was evidence tending to prove the contract and a breach thereof, as alleged, the plaintiff was entitled to have the third special instruction which he demanded and the court gave. The plaintiff alleged that the defendant, by the terms of the contract had possession of the mare only for the purposes of training her. If he went beyond that, and used her, as alleged, for other purposes, he committed a breach of the contract, and the plaintiff might demand and have possession of her. * * *

BAILMENTS FOR THE BAILOR'S SOLE BENEFIT

I. Absence of Compensation to the Bailee [1]

WOODRUFF v. PAINTER et al.

(Supreme Court of Pennsylvania, 1892. 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451, 30 Am. St. Rep. 786.)

Action by Charles D. Woodruff against George E. Painter and Charles H. Eldredge for value of a watch. Judgment for defendants. Plaintiff appeals.

HEYDRICK, J.[2] The defendants were retail dealers in clothing in the city of Philadelphia. The plaintiff, in company with his wife, visited their store for the purpose of purchasing a suit of clothes, having upon his person at the time a watch and chain. Having selected a coat and vest, and being about to remove the corresponding garments for the purpose of trying on those selected, he took off his watch and chain, and was about to lay it on a pile of clothing, when the salesman who was waiting upon him said, "You had better put your watch here," indicating a drawer from which the vest had been taken; and adding, "It will be safe, I guess." The watch and chain were accordingly put in the drawer, and the drawer was closed by the salesman. The plaintiff, his wife, and the salesman then went to another part of the store, where there was a mirror, and the coat and vest, having been tried on, were found to be satisfactory. They next turned their attention to the selection of a pair of pantaloons, in doing which the plaintiff went twice to a dressing room connected with the store. While he was thus engaged in trying on pantaloons, the salesman conducted his wife to a seat some distance from the drawer in which the watch and chain had been placed, and to the vicinity of which she had returned after the coat and vest had been selected, and there entertained her during the time her husband was in the dressing room. When the entire suit had been selected, and the plaintiff had replaced the garments which he wore when entering the store, he said to the salesman, "Now we will take the watch." The salesman opened the drawer in which it had been placed, but it was not there. * * *

Whatever thus necessarily, or, in common with people generally, he habitually carries with him, and must necessarily lay aside in the store while making or examining his purchases, he is invited to lay aside by the invitation to come and purchase, and, having laid it aside

[1] For discussion of principles, see Doble, Bailm. & Carr. § 23.

[2] Parts of the opinion have been omitted.

upon such invitation and with the knowledge of the dealer, he has committed it to his custody. And, this being a necessary incident of the business upon which the customer was invited to come to the store, the care of the property would be within the authority of the salesman assigned to wait upon him; it would be part of the transaction in which he is authorized to represent his employer. This much was assumed without question in Bunnell v. Stern, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. Rep. 519, a case differing from the present in this only: that the article lost was a lady's cloak, and the saleswoman took no care whatever of it.

Assuming that the jury would have found that a watch is such personal belonging as men usually carry with them, and that in the selection of a suit of clothes it is necessary or usual to remove it from the person, and lay it aside; and, further, that the plaintiff, by direction of the defendants' salesman, placed his watch in a designated drawer in the store, preparatory to the selection of a suit of clothes, to purchase which he visited the store,—the defendants thereby became chargeable as bailees. The principles which govern that relation are briefly and clearly stated by Judge Story, in his work on Bailments, thus: "When the bailment is for the benefit of the bailor, the law requires only slight diligence on the part of the bailee, and of course makes him answerable only for gross neglect. When the bailment is for the sole benefit of the bailee, the law requires great diligence on the part of the bailee, and makes him responsible for slight neglect. When the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect." Manifestly the bailment, in a case like the present, is of the latter class, for, while the customer pays nothing directly, or eo nomine, for the safe-keeping of his effects, the dealer receives his recompense in the profits of the trade of which the bailment is a necessary incident. It was upon this principle that Lord Holt said, in Lane v. Cotton, 12 Mod. 483, an action was sustainable against an innkeeper for the loss of a guest's goods, and that the court of appeals affirmed the judgment of the court of common pleas of the city of New York in Bunnell v. Stern, supra. In Massachusetts the proprietor of a liquor store, who permitted an order slate for an expressman to be kept in his store, and allowed people to leave packages there to be taken away by the expressman, was held to be a bailee for hire on the theory that what he thus permitted brought him an increase of business. Newhall v. Paige, 10 Gray (Mass.) 366. This, however, would seem to be pushing the principle to a dangerous extreme; it would render it unsafe for any business man to allow another's property to be left about his premises, and would be in seeming conflict with our own case of Bank v. Graham, 79 Pa. 106, 21 Am. Rep. 49, and De Haven v. Bank, 81 Pa. 95. The safer rule is to hold a bailment to be for hire when no hire is paid in such cases only as it is a necessary incident of a business in which

the bailee makes profit; and such the jury might have found the present case to have been. * * * The judgment is reversed, and a venire facias de novo is awarded.

VIGO AGRICULTURAL SOCIETY v. BRUMFIELD.

(Supreme Court of Indiana, 1885. 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657.)

ELLIOTT, J.[8] Gathered into a condensed form, the material averments of the appellee's complaint are these: The Vigo Agricultural Society is an association organized under the laws of the state for the purpose of conducting fairs for the exhibition of agricultural products, manufactured articles, and other things. Prior to September, 1883, the society issued advertisements inviting persons to place on exhibition at a fair to be held in that month. The society agreed to take care of articles placed on its ground by exhibitors. The appellee, in response to the invitation of the society, did put a gun, of which he was the owner, on exhibition in the place appropriated to that purpose, and, while the gun "was in the care and keeping of the society," it negligently and carelessly suffered it to be stolen, without any fault on the part of the appellee.

The question presented by the demurrer to the complaint is, not as to the general duties and liabilities of an agricultural association, but the question is as to the law upon the facts pleaded. The case made by the complaint is one of bailment. The bailment was not a gratuitous one, for the reason that the exhibition of the gun, in response to the invitation contained in the advertisement of the appellant, constituted a consideration for the undertaking. It may be true that both parties derived a benefit, but this did not strip the contract of its character,—that of a bailment for reward. The reward was not, it is true, in money, but it was, nevertheless, a reward in the form of an act performed at the request of the bailee. An association which invites persons to supply articles to enable it to conduct an exhibition, receives some consideration from the person who responds to its invitation by placing articles in its care for exhibition. Where a consideration of an indeterminate value is agreed upon by the parties, the courts will not undertake to determine its adequacy, but will respect the judgment of the parties and enforce their contract. Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Williamson v. Hitner, 79 Ind. 233; Neidefer v. Chastain, 71 Ind. 363, 36 Am. Rep. 198; Smock v. Pierson, 68 Ind. 405, 34 Am. Rep. 269; Baker v. Roberts, 14 Ind. 552; Hardesty v. Smith, 3 Ind. 39. * * *

[8] Part of the opinion is omitted.

GRAY et al. v. MERRIAM.

(Supreme Court of Illinois, 1893. 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172.)

MAGRUDER, J.[4] The main error assigned is the giving of the first instruction given by the trial court for the plaintiff. It is claimed by plaintiff in error that the defendant bankers were gratuitous bailees, holding the bonds in controversy as a special deposit for safe-keeping without reward. The general rule is that a gratuitous bailee is liable only for gross negligence. Story, Bailm. (9th Ed.) §§ 62, 79; Schouler, Bailm. (2d Ed.) § 35; Skelly v. Kahn, 17 Ill. 170. The instructions for both plaintiff and defendants require the jury to find that the defendants were guilty of gross negligence in the keeping of the bonds, as a condition to the right of recovery. But the objection made to plaintiff's instruction is the definition which it gives of gross negligence in the use of the following clause: "The want of ordinary and reasonable care is in law termed 'gross negligence.'" Gross negligence has been defined to be the absence or want of slight care or diligence. Story, Bailm. §§ 62, 64; Schouler, Bailm. §§ 15, 35; Railroad Co. v. Carrow, 73 Ill. 348, 24 Am. Rep. 248; Railroad Co. v. Johnson, 103 Ill. 512. But the portions of the instruction which precede and follow said clause are in harmony with much of the language used in the text-books and decisions.

Schouler, in his recent work on Bailments and Carriers (section 35), after announcing that the gratuitous bailee is liable only for slight care and diligence, according to the circumstances, and cannot be held for loss or injury unless grossly negligent, says: "This statement of the rule, though strongly buttressed upon authority, fails at this day of universal approval in our jurisprudence. * * * 'Slight,' 'ordinary,' and 'great,' are terms they [some courts] wish to see discarded, and they prefer judging of each case by its own complexion." The same author states that, in the main, gross negligence is a question of fact upon all the evidence for the jury, and that what constitutes slight diligence or gross negligence will depend in each case upon a variety of circumstances, such as the occupation, habits, skill, and general character of the bailee, and local custom and business usage. Schouler, Bailm. §§ 49, 50. Story, after stating the rule that, when the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, subsequently adds that in every case good faith requires a bailee without reward to take reasonable care of the deposit; "and what is reasonable care must materially depend upon the nature, value, and quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence and particular dealings of the parties." Story, Bailm. §§ 23, 62.

[4] The statement of facts has been omitted.

In Smith v. Bank, 99 Mass. 605, 97 Am. Dec. 59, which was an action against a bank for the conversion or loss by gross negligence of valuable articles deposited with it as a bailee without hire, the court said: "This was a gratuitous bailment. The defendants are liable only for want of ordinary care." A deposit is a naked bailment of goods to be kept for the bailor without recompense, and to be returned when the bailor shall require it, while a mandate is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them. Story, Bailm. §§ 4, 5. But a mandatory, like a depository, is said to be bound only to slight diligence, and responsible only for gross neglect. Story, Bailm. § 174. In Skelly v. Kahn, supra, we held that "a mandatory or bailee who undertakes, without reward, to take care of the pledge, or perform any duty or labor, is required to use in its performance, such care as men of common sense and common prudence, however inattentive, ordinarily take of their own affairs, and they will be liable only for bad faith or gross negligence, which is an omission of that degree of care." The liability of banks, acting as bailees without reward in the case of special deposits has been recently considered in the case of Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788, and it was there held that such bailees are bound to exercise such reasonable care as men of common prudence usually bestow for the protection of their own property of a similar character; that the exercise of reasonable care is in all such cases the dictate of good faith; and that the care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would be required of the bailee in such cases, but nothing more. Gross negligence, as applied to gratuitous bailees, is defined in that case to be "nothing more than a failure to bestow the care which the property in its situation demands;" and the court further says: "The omission of the reasonable care required is the negligence which creates the liability, and whether this existed is a question of fact for the jury to determine."

In the light of these more liberal views as to the liabilities of bailees without reward, we think that the clause in question, when considered in connection with the rest of the instructions, could only have been understood by the jury as referring to the want of such ordinary and reasonable care as was designated in the previous part of the instruction; that is to say, the care usually and generally deemed necessary in the community for the security of similar property under like circumstances. The rule that a gratuitous bailee is responsible only for the want of care which is taken by the most inattentive cannot be applied to all cases of bailment without reward. When securities are deposited with banks accustomed to receive such deposits, they are liable for any loss thereof occurring through the want of that degree of care which good business men should exercise in

keeping property of such value. Bank v. Zent, 39 Ohio St. 105; 16 Amer. & Eng. Enc. Law, pp. 160, 206.

But if it be conceded that the definition of gross negligence in the clause above quoted, even when considered in connection with the balance of the instruction, is technically inaccurate, it does not follow that plaintiff in error is entitled to a reversal of the judgment in this case. A judgment will not be reversed for error in an instruction when it appears affirmatively that the defeated party was not injured by the error. The absence of such injury is clearly manifest when the undisputed evidence establishes the correctness of the verdict, so that, either with or without the erroneous instruction, the verdict could not have been otherwise than it was, and, had it been otherwise, would have been set aside by the court. Hall v. Sroufe, 52 Ill. 421; Burling v. Railroad Co., 85 Ill. 18; Hubner v. Feige, 90 Ill. 208; Railroad Co. v. Warner, 108 Ill. 538; Rolling-Stock Co. v. Wilder, 116 Ill. 100, 5 N. E. 92; Town of Wheaton v. Hadley, 131 Ill. 640, 23 N. E. 422.

The defendants in this case did a regular banking business. The plaintiff kept a deposit and check account with them. He borrowed money from them from time to time, and authorized them to hold the bonds in question as collaterals to secure the notes given for such loans. While the bonds were thus held as collaterals, the character of the bailment was changed from a bailment for the exclusive benefit of the bailor to one for the mutual benefit of the bailor and bailee. Preston v. Prather, supra. In ordinary cases of special deposits without reward, the banker has no right to handle or examine the property except so far as its safety may require. But here the bankers had access to the package containing the bonds, and detached the interest coupons when they fell due, and collected the interest, and deposited it to the credit of the plaintiff, to be checked out by him in the regular course of business. Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750; Whitney v. Bank, 55 Vt. 154, 45 Am. Rep. 598. Ker, the assistant cashier of the bank, stole the bonds in the summer of 1882. He had access to these bonds, and to the other special deposits kept by the bank in its vault. About a year before he absconded, Kean, the chief officer of the bank, had his attention called to the fact that Ker was speculating upon the Board of Trade in Chicago, and a conversation upon the subject with him. Ker was not known to have any other property than his salary of $1,800. He was, however, allowed to retain his position in the bank, and no effort was made to verify the truth of the statements made as to his speculations, and no examination was made to ascertain whether he was using moneys which did not belong to him. About two months before he absconded, the subject of his speculations was again called to the attention of the chief officers of the bank through an anonymous communication, and Kean had a second interview with him in relation to his conduct

in this regard. "The defendants then entered upon an examination of their books and securities, but made no effort to ascertain whether the special deposits had been disturbed." Preston v. Prather, supra. The facts thus detailed are undisputed, and are established by the evidence of the defendants themselves.

In Preston v. Prather, supra, an action was brought in the circuit court of the United States by parties in Missouri, doing business under the firm name of the Nodaway Valley Bank of Maryville, against the same bankers who are defendants in the present suit, to recover the value of United States bonds held as a special deposit, and stolen by the said Ker about the same time when he appropriated the bonds in controversy here. The Prather Case was tried by agreement before the federal circuit judge without a jury, resulting in judgment for the plaintiffs, and was taken afterwards to the supreme court of the United States, where the judgment rendered by the circuit judge was affirmed. The evidence in that case established substantially the same facts as are herein set forth. Those facts, which are here undisputed and supported by the testimony of the defendants, were there held by the federal supreme court to constitute such gross negligence as to make the defendants liable for the loss of the bonds; the court saying: "As stated above, the reasonable care which persons should take of property intrusted to them for safe-keeping without reward will necessarily vary with its nature, value, and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him, as, for example, in the case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect property in their custody. Persons, therefore, depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and thieves within, and that, whenever ground for suspicion arises, an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of these measures would in most cases be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor. It was this view of the duty of the defendants in this case, who were engaged in business as bankers, and the evidence of their neglect, upon being notified of the speculations in stocks of their assistant cashier, who stole the bonds, to make the necessary examination respecting the securities deposited with them, or to remove the speculating cashier, which led the court [below] to its conclusion that they were guilty of gross negligence. * * * In this conclusion we fully concur." Inasmuch as the undisputed facts presented to the jury for their consideration on their trial below have been determined by the supreme court of the

United States to amount to such gross negligence as will fasten liability upon a gratuitous bailee, we are disposed to hold that the verdict of the jury was right, independently of the error in the instruction, and that it ought not to be disturbed. Scott v. Bank, 72 Pa. 471, 13 Am. Rep. 711.

It is said that the trial court erred in admitting testimony showing that the bonds had been pledged as collateral security for loans made by the bank to the plaintiff at various times before they were stolen, and that the evidence should have been confined to the character of the bailment at the time of the loss, in the summer or fall of 1882, as at the latter date all previous loans for the security of which the bonds had been pledged had been paid up, and they were there held merely as a special deposit. We think that this testimony, as well as that showing that Ker had access to the bonds for the purpose of cutting the quarterly coupons therefrom as late as October, 1882, after some of them had been abstracted, was competent to show the relation of the parties to each other and to the property. As the reasonable care which the defendants were required to take of the bonds depended upon the situation, and the bearing of the surrounding circumstances, and the nature of the custody which they were allowed to exercise over the bonds, the extent to which they were permitted to have access to the bonds under instructions by correspondence from the plaintiff, who lived in Iowa, either for the purpose of holding them as collaterals to notes, or for the purpose of detaching the coupons, had a direct bearing upon the question of their obligation to make examination when advised of the speculations of their assistant cashier. The judgment of the appellate court is affirmed.

II. Liability of Bailee for Nonfeasance and Misfeasance[5]

THORNE v. DEAS.

(Supreme Court of Judicature of New York, 1809. 4 Johns. 84.)

This was an action on the case, for a nonfeasance, in not causing insurance to be made on a certain vessel, called the Sea Nymph, on a voyage from New York to Camden, in North Carolina. The vessel was wrecked * * * on the coast of North Carolina. No insurance had been effected. * * *

KENT, C. J.,[6] delivered the opinion of the court. The chief objection raised to the right of recovery in this case, is the want of a con-

[5] For discussion of principles, see Dobie, Bailm. & Carr. § 26.

[6] The statement of facts has been abbreviated, and part of the opinion omitted.

sideration for the promise. The offer, on the part of the defendant, to cause insurance to be effected, was perfectly voluntary. Will, then, an action lie, when one party intrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement, enters upon the execution of the business, and does it amiss, through want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But the defendant never entered upon the execution of his undertaking, and the action is brought for the nonfeasance. Sir William Jones, in his "Essay on the Law of Bailments," considers this species of undertaking to be as extensively binding in the English law, as the contract of *mandatum,* in the Roman law; and that an action will lie for damage occasioned by the non-performance of a promise to become a *mandatary,* though the promise be purely gratuitous. This treatise stands high in the profession, as a learned and classical performance, and I regret, that, on this point, I find so much reason to question its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged case; but only some dicta (and those equivocal) from the Year Books, in support of his opinion; and was it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument.

A short review of the leading cases will show, that, by the common law, a *mandatary,* or one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a *misfeasance,* but not for a *nonfeasance,* even though special damages be averred. Those who are conversant with the doctrine of *mandatum* in the civil law, and have perceived the equity which supports it, and the good faith which it enforces, may, perhaps, feel a portion of regret, that Sir William Jones was not successful in his attempt to ingraft this doctrine, in all its extent, into the English law. I have no doubt of the perfect justice of the Roman rule, on the ground, that good faith ought to be observed, because the employer, placing reliance upon that good faith in the mandatary, was thereby prevented from doing the act himself, or employing another to do it. This is the reason which is given in the Institutes for the rule: *Mandatum non suscipere cuilibet liberum est; susceptum autem consumandum est, aut quam primum renunciandum, ut per semetipsum aut per alium, eandem rem mandator exequatur.* Inst. lib. 3. 27. 11. But there are many rights of moral obligation which civil laws do not enforce, and are, therefore, left to the conscience of the individual, as rights of imperfect obligation; and the promise before us seems to have been so left by the common law, which we cannot alter, and which we are bound to pronounce.

The earliest case on this subject, is that of Watson v. Brinth (Year Book 2 Hen. IV. 3 b.), in which it appears that the defendant promised

to repair certain houses of the plaintiff, and had neglected to do it, to his damage. The plaintiff was nonsuited, because he had shown no covenant; and Brincheley said, that if the plaintiff had counted that the thing *had been commenced, and afterwards, by negligence, nothing done,* it had been otherwise. Here the court, at once, took the distinction between *nonfeasance* and *misfeasance.* No consideration was stated, and the court required a covenant to bind the party.

In the next case (11 Hen. IV. 33 a.) an action was brought against a carpenter, stating that he had undertaken to build a house for the plaintiff, within a certain time, and had not done it. The plaintiff was also nonsuited, because the undertaking was not binding without a specialty; but, says the case, *if he had undertaken to build the house, and had done it illy or negligently,* an action would have lain, without deed. Brooke (Action sur le Case, pl. 40.) in citing the above case, says, that "it seems to be good law to this day; wherefore the action upon the case which shall be brought upon the assumption, must state that for such a sum of money to him paid, &c., and that in the above case, it is assumed, that there was no sum of money, therefore it was a nudum pactum."

The case of 3 Hen. VI. 36 b. is one referred to, in the Essay on Bailments, as containing the opinion of some of the judges, that such an action as the present could be maintained. It was an action against Watkins, a mill-wright, for not building a mill according to promise. There was no decision upon the question, and in the long conversation between the counsel and the court, there was some difference of opinion on the point. The counsel for the defendant contended, that a consideration ought to have been stated; and of the three judges who expressed any opinion, one concurred with the counsel for the defendant, and another (Babington, C. J.) was in favor of the action, but he said nothing expressly about the point of consideration, and the third (Cokain, J.) said, it appeared to him that the plaintiff had so declared, for it shall not be intended that the defendant would build the mill for nothing. So far is this case from giving countenance to the present action, that Brooke (Action sur le Case, pl. 7. and Contract, pl. 6) considered it as containing the opinion of the court, that the plaintiffs ought to have set forth what the miller was to have for his labor, for otherwise, it was a *nude pact*; and in Coggs v. Bernard, Mr. Justice Gould gave the same exposition of the case.

The general question whether *assumpsit* would lie for a *nonfeasance,* agitated the courts in a variety of cases, afterwards, down to the time of Hen. VII. (14 Hen. VI. 18 b. pl. 58. 19 Hen. VI. 49 a. pl. 5. 20 Hen. VI. 34 a. pl. 4. 2 Hen. VII. 11. pl. 9. 21 Hen. VII. 41 a. pl. 66). There was no dispute or doubt, but that an action upon the case lay for a *misfeasance* in the breach of a trust undertaken voluntarily. The point in controversy was, whether an action upon the case lay for a *nonfeasance,* or non-performance of an agreement, and whether there

was any remedy, where the party had not secured himself by a covenant or specialty. But none of these cases, nor, as far as I can discover, do any of the *dicta* of the judges in them, go so far as to say, that an *assumpsit* would lie for the non-performance of a promise, without stating a consideration for the promise. And when, at last, an action upon the case for the non-performance of an undertaking came to be established, the necessity of showing a consideration was explicitly avowed.

Sir William Jones says, that "a case in Brooke, made complete from the Year Book to which he refers, seems directly in point." The case referred to is 21 Hen. VII. 41. and it is given as a loose *note* of the reporter. The chief justice is there made to say, that if one agree with me to build a house by such a day, and he does not build it, I have an action on the case for this *nonfeasance,* equally as if he had done it amiss. Nothing is here said about a consideration; but in the next instance which the judge gives of a *nonfeasance* for which an action on the case lies, he states a consideration paid. This case, however is better reported in Keilway, 78. pl. 5., and this last report must have been overlooked by the author of the "Essay." Frowicke, C. J., there says, "that if I covenant with a carpenter to build a house, and pay him 20l. to build the house by a certain day, and he does not do it, I have a good action upon the case, *by reason of the payment of my money; and without payment of the money in this case,* no remedy. And yet, if he makes the house in a bad manner, an action upon the case lies; and so for the *nonfeasance, if the money be paid,* action upon the case lies."

There is, then, no just reason to infer, from the ancient authorities, that such a promise as the one before us is good, without showing a consideration. The whole current of the decisions runs the other way, and, from the time of Henry VII. to this time, the same law has been uniformly maintained.

The doctrine on this subject, in the Essay on Bailments, is true, in reference to the civil law, but is totally unfounded in reference to the English law; and to those who have attentively examined the head of Mandates, in that Essay, I hazard nothing in asserting, that that part of the treatise appears to be hastily and loosely written. It does not discriminate well between the cases; it is not very profound in research, and is destitute of true legal precision. * * *

The plaintiffs have, then, failed in their attempt to bring this case within the range of the decisions, or within any principle which gives an action against a commercial agent, who neglects to insure for his correspondent. Upon the whole view of the case, therefore, we are of opinion, that the defendant is entitled to judgment.

Judgment for the defendant.

III. Interest of Bailor and Bailee[1]

COMMONWEALTH v. MORSE.

(Supreme Judicial Court of Massachusetts, 1817. 14 Mass. 217.)

The defendant was indicted for stealing an ox, the property of which was alleged in the indictment to have been in one Cromwell Leonard.

At the trial, which was had before Wilde, J., at the last October term in the county of Bristol, it was in evidence that the general property in the ox was in one Olive Morse; that the day before it was taken away by the defendant, it was attached by one of the deputy sheriffs of the county of Bristol, as the property of the said Olive Morse, at the suit of the said Cromwell Leonard, and delivered by the deputy sheriff to the said Leonard, who gave to the deputy sheriff his receipt for the same, thereby promising to be accountable for the ox, and to re-deliver the same on demand; and that the ox was taken by the defendant from the said Leonard's barn-yard. * * *

PARKER, C. J.[2] The indictment alleges that the article stolen was of the goods and chattels of Cromwell Leonard. The evidence proved that the only interest, which Leonard had in it, was derived from the custody which he had undertaken for a deputy sheriff, who had attached the ox as the property of Olive Morse. The question presented by the motion for a new trial is, whether the allegation in the indictment, of property in Leonard, is sufficiently maintained by this evidence. * * *

By the same books it will appear, that the averment will be made out by proving that the goods stolen were either the general or special property of the person averred to be the owner. But the averment being material must be proved, in order to support the indictment.

The only question then is, whether the report of the case by the judge shows that the ox stolen was of the goods and chattels, or in other words, was the property of Cromwell Leonard. It was not his property absolutely for he had nothing but the possession, not claiming any title to it. The special property was in the deputy sheriff, who made the attachment. There is no third species of property. Leonard therefore was the mere servant of the deputy sheriff, to keep the property attached for him; having no legal interest in it, and no right to maintain an action for it, if taken out

[1] For discussion of principles, see Doble, Bailm. & Carr. § 28.

[2] Parts of the statement of facts and of the opinion are omitted.

of his custody, as was decided in the cases of Ludden v. Leavitt, 9 Mass. 104, 6 Am. Dec. 45, and Warren and Leland, 9 Mass. 265.

It follows that the evidence at the trial was not sufficient to support the indictment. The verdict must be set aside, and a new trial granted.

IV. Degree of Care to be Exercised by the Bailee [9]

TRACY et al. v. WOOD.

(Circuit Court, D. Rhode Island, 1822. 3 Mason, 132, Fed. Cas. No. 14,130.)

STORY, Circuit Justice.[10] After summing up the facts, said, I agree to the law as laid down at the bar, that in cases of bailees without reward, they are liable only for gross negligence. Such are depositaries, or persons receiving deposits without reward for their care; and mandataries, or persons receiving goods to carry from one place to another without reward. The latter is the predicament of the defendant. He undertook to carry the gold in question for the plaintiff, gratuitously, from New York to Providence, and he is not responsible unless he has been guilty of gross negligence. Nothing in this case arises out of the personal character of the defendant, as broker. He is not shown to be either more or less negligent than brokers generally are; nor if he was, is that fact brought home to the knowledge of the plaintiffs. They confided the money to him as a broker of ordinary diligence and care, having no other knowledge of him; and, therefore, no question arises as to what would have been the case, if the plaintiffs had known him to be a very careless or a very attentive man. Jones, Bailm. 46.

The language of the books, as to what constitutes gross negligence, or not, is sometimes loose and inaccurate from the general manner in which propositions are stated. When it is said, that gross negligence is equivalent to fraud, it is not meant, that it cannot exist without fraud. There may be very gross negligence in cases where there is no pretence that the party has been guilty of fraud; though certainly such negligence is often presumptive of fraud. In determining what is gross negligence, we must take into consideration

[9] For discussion of principles, see Doble, Bailm. & Carr. § 29. Besides the cases under this heading, see the great leading case of Coggs v. Bernard, ante, p. 1; and see, also, Gray v. Merriam, ante, p. 43.

[10] The statement of facts is omitted.

what is the nature of the thing bailed. If it be of little value, less care is required, than if it be of great value. If a bag of apples were left in a street for a short time, without a person to guard it, it would certainly not be more than ordinary neglect. But if the bag were of jewels or gold, such conduct would be gross negligence. In short, care and diligence are to be proportional to the value of the goods, the temptation and facility of stealing them, and the danger of losing them. So Sir William Jones lays down the law: "Diamonds, gold, and precious trinkets," says he, "ought from their nature to be kept with peculiar care, under lock and key; it would, therefore, be gross negligence in a depositary to leave such deposit in an open antechamber; and ordinary neglect, at least, to let them remain on the table, where they might possibly tempt his servants." Jones, Bailm. 38, 46, 62. So in Smith v. Horne, 2 Moore, C. P. 18, it was held to be gross negligence in the case of a carrier, under the usual notice of not being responsible for goods above £5 in value, to send goods in a cart with one man, when two were usually sent to see to the delivery of them. So in Rooth v. Wilson, 1 Barn. & Ald. 59, it was held gross negligence in a gratuitous bailee to put a horse into a dangerous pasture. In Batson v. Donovan, 4 Barn. & Ald. 21, the general doctrine was admitted in the fullest terms.

It appears to me, that the true way of considering cases of this nature, is, to consider whether the party has omitted that care which bailees, without hire, or mandataries of ordinary prudence usually take of property of this nature. If he has, then it constitutes a case of gross negligence. The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence. But whether there be a want of that care, which men of common sense, however inattentive, usually take, or ought to be presumed to take of their property, for that is gross negligence. The contract of bailees without reward is not merely for good faith, but for such care as persons of common prudence in their situation usually bestow upon such property. If they omit such care, it is gross negligence.

The present is a case of a mandatary of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care, than common property. The defendant is a broker, accustomed to the use and transportation of money, and it must be presumed he is a person of ordinary diligence. He kept his own money in the same valise; and took no better care of it than of the plaintiffs.' Still if the jury are of opinion, that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such

property, under such circumstances, he has been guilty of gross negligence.

Verdict for the plaintiffs for $5,700, the amount of one bag of the gold; for the defendant as to the other bag.

CONNER v. WINTON.

(Supreme Court of Indiana, 1856. 8 Ind. 315, 65 Am. Dec. 761.)

STUART, J.[11] Conner sued Winton for unskilfully doctoring a horse. The complaint contained two counts alleging in substance that Conner was the owner of a horse worth $175, which had a swelling on the hock joint; that Winton represented that he could relieve the horse by lancing, &c.; that he accordingly lanced the diseased limb, but so ignorantly and unskilfully as for ever to disable the horse and render him worthless. It is further alleged that Conner was put to 25 dollars expense. Damages laid at 200 dollars. * * *

The following instruction to the jury is excepted to by the plaintiff:

"If Winton pretended to no skill as a farrier, or was not known to Conner as such, but as a matter of friendship or otherwise, recommended the making of the puncture, and the same was assented to by Conner, and the puncture was accordingly made, Dr. Winton is not liable, even though the horse died in consequence of the puncture so made."

The general rule in relation to bailment is, that where the contract is of mutual benefit, as where the work is done for hire, there, ordinary diligence only is required. Here, there is no special contract to that effect set up. So that none of the received doctrines in relation to care, skill, &c., combined are applicable. The instruction assumes that the lancing was done without hire "as a matter of friendship or otherwise," and hence, its correctness must be tested by the rules applicable to that species of bailment.

When an act is thus done gratis, it is called in the books a mandate. Story on Bailm. p. 159; Coggs v. Bernard, 1 Smith's L. Cases, 82; 2 Kent, 568. It was therefore a bailment of the horse in regard to which Winton undertook, as assumed in the instruction, to do an act without reward.

What, then, were the obligations of Dr. Winton as such mandatary? That a mandatary is liable for misfeasance or malfeasance is settled by the highest authority. Story on Bailm. 180, infra; 2 Kent, 569. The degree of diligence required of the mandatary is equally well settled. He is bound only to slight diligence, and responsible only for gross neglect. 2 Kent, 571, 572; Story on

[11] Part of the opinion is omitted.

Bailm. 194; Whitney v. Lee, 8 Metc. (Mass.) 91. In Tracy v. Wood, 3 Mason, 132, Fed. Cas. No. 14,130, it is held that a mandatary is liable if he omit that care which persons of common prudence are accustomed to take of their own property. In Moore v. Mourgue, Cowp. 479, Lord Mansfield held, that to maintain such an action, the defendant must be guilty either of a breach of orders, gross negligence, or fraud. So, also, Dartnall v. Howard, 4 B. & C. 345.

The authorities are also abundant to show that, in proportion to the value of the article to be kept, or the delicacy of the operation to be performed, will the act assume character. What would be simply negligence as to one thing, would be gross negligence as to another. What would be ordinary care in relation to a pound of nails, would be gross negligence in relation to a like weight of gold coin. So what might be proper care in mending a plow, might be the grossest negligence as applied to the repair of a watch. Story on Bailm. supra. So that what on the part of Winton might have been due diligence in thrusting his lance into a vein of the horse's neck, might have been very gross negligence in lancing the complicated and delicate machinery of the hock joint.

It is, therefore, very clear that though Winton acted as a "friend or otherwise,"—that is, without compensation, as the instruction implies,—he might still be liable for consequences. Hence, the instruction is erroneous. It makes his mandatary position screen him from all liability. The assumption in relation to his not being a professional farrier is equally erroneous. If he assumed to perform so delicate an operation, his not being a professional farrier would not screen him from liability in case he performed it in gross ignorance or with gross negligence.

We think the instruction not only erroneous, but well calculated to mislead the jury.

PER CURIAM. The judgment is reversed with costs. Cause remanded, &c.

BAILMENTS FOR THE BAILEE'S SOLE BENEFIT

I. The Nature of the Relation [1]

BENNETT v. O'BRIEN.

(Supreme Court of Illinois, 1865. 37 Ill. 250.)

Action of case by O'Brien against Bennett for the value of a mare. Verdict and judgment for plaintiff below for $120. The facts appear in the opinion.

LAWRENCE, J. O'Brien let Bennett, the appellant, have the use of his horse without compensation. This gratuitous bailment imposed on the appellant the duty of extraordinary care. After a drive in January, 1864, of eighteen miles from his home, returning the next day, the mare sickened and died. The evidence is conflicting as to the cause of her death. Two witnesses swear that the defendant admitted she had been driven into a snow bank. The jury found a verdict for O'Brien, the plaintiff below, for the value of the mare.

The appellant insists that the court erred in refusing to give his 1st, 2d, 4th and 7th instructions. The first was as follows: "If the jury believe from the evidence that the mare in question died from inevitable casualty or by causes or under circumstances over which the defendant had no control, and could not prevent, then they will find for the defendant, unless they further believe that the defendant was guilty of gross negligence and carelessness."

This instruction would have misled the jury. Although the direct cause of the mare's death may have been a disease over which the defendant had no control, yet if that disease was traceable to the slightest negligence on the part of the defendant, this would render him liable.

The second instruction was as follows: "If the jury believe from the evidence that the defendant used the same care, diligence and prudence in taking care of the mare in question that a prudent, careful man would take care of his own property under similar circumstances, they will find for defendant."

This instruction is wrong in assuming that the bailment was a bailment for hire.

When the loss of the mare is shown, the proof of negligence or want of care is thrown upon the plaintiff; it being a presumption of law that proper care and diligence were exercised on the part of the defendant.

[1] For discussion of principles, see Doble, Bailm. & Carr. § 33.

There is some conflict of authority on this subject, but we think this instruction was properly refused in reference to a gratuitous bailee. When the death of the mare, in the hands of the defendant was proven, together with the character of the bailment, it devolved upon him to show that he had exercised the degree of care required by the nature of the bailment. These were facts peculiarly within his knowledge and power to prove, and any other rule would impose great difficulties upon bailors.

The seventh instruction was as follows: "If the jury believe from the evidence that the mare did not die from the effects of overdriving and misusage on the part of the defendant, they will find for defendant."

This instruction, like the second, is objectionable because it assumes that the defendant was only bound to such care of the mare as would be a bailee for hire. Even if the mare did not die from positive overdriving and misusage, yet if her disease was traceable to the slightest negligence on the part of the defendant, he would be liable. The counsel for appellant regard the bailment as a bailment for hire. We do not so consider it, but if it were doubtful upon the evidence, these instructions are wrong in assuming it to be a hiring, instead of putting the case hypothetically.

In regard to the character of the bailment, it may be remarked that the fact of the plaintiff being saved the keeping of his horse by loaning him to the defendant, although to that extent the loan may be considered an advantage to him, does not take from it the character of a gratuitous bailment. Such incidental advantage is not the compensation necessary to make the bailment one of hire. The loan of the use of domestic animals necessarily involves their keeping. He who borrows the horse of another for a week's journey must not only incur the expense of feeding him, but he must take the responsibilities of a gratuitous bailee. Howard v. Babcock, 21 Ill. 265. In the case before us, no compensation was paid for the use of the horse.

We think the verdict sustained by the evidence. Judgment affirmed.

II. The Use of the Bailed Chattels by the Bailee [2]

BELLER v. SHULTZ.

(Supreme Court of Michigan, 1880. 44 Mich. 529, 7 N. W. 225, 38 Am. Rep. 280.)

GRAVES, J. Shultz went to work for Beller and took two flags with him, a large one and a small one. He lent the large one to Beller and helped to put it up on Beller's building. He went away without taking the small one, and permitted the other to remain flying where

[2] For discussion of principles, see Dobie, Bailm. & Carr. § 37.

he had assisted in placing it. Subsequently a hail-storm injured it. He sent for both flags and received the small one but failed to receive the other. It was worth $20. He sued in assumpsit before a justice for the value and on these facts was allowed to recover and the circuit court in certiorari affirmed the judgment. There was no cause of action on the facts. Even where the loan is gratuitous, the borrower is not an insurer.

The thing is subject to the kind and mode of use for which it is designed and the risk of such losses as are fairly incident thereto is with the owner, unless the bailee has failed in his duty to anticipate and guard against the danger. The thing here was made on purpose to be used as a flag, and the propriety of exposing it as one in the very position and in the very season selected cannot be questioned by Shultz: because in fact that exposure was in substance his own act. The bailment is not shown to have been abused. There is no proof that Beller failed in his duty. If there was any want of such care to guard the flag against injury from storms as the law would consider due, which is not probable, it was for Shultz to give evidence to prove it. He gave none whatever and it is not to be presumed that Beller was in fault.

The failure to get the flag back is not traced to Beller. The case goes no further than to say that Shultz sent for it and did not receive it. Where the fault lay, if there was any, does not appear and cannot be inferred. Certainly it cannot be imputed without proof, to Beller. It may have been obtained from him in answer to Shultz's request and been miscarried or otherwise disposed of thereafter without his (Beller's) agency. Or it may be that no request was made to Beller to deliver or surrender it. There were no facts to affect Beller with liability in any form and it is needless to inquire whether assumpsit might have been maintained in case the evidence had shown an abuse of the alleged bailment.

The judgment must be reversed with the costs of all the courts.

MARSTON, C. J., and CAMPBELL, J., concurred.

BRINGLOE v. MORRICE.

(Court of Common Pleas, 1675. 1 Mod. 210, 3 Salk. 271.)

Trespass for immoderately riding the plaintiff's mare. The defendant pleaded, That the plaintiff lent to him the said mare, *et licentiam dedit eidem equitare* upon the said mare; and that by virtue of this license the defendant and his servant *alternatim* had rid upon the mare. The plaintiff demurs.

THE COURT. The license is annexed to the person, and cannot be communicated to another; for this riding is matter of pleasure.

NORTH, C. J., took a difference, where a certain time is limited

for the loan of the horse, and where not. In the first case, the party to whom the horse is lent, hath an interest in the horse during that time, and in that case his servant may ride, but in the other case not. A difference was taken betwixt *hiring* a horse to go to York, and *borrowing* a horse: in the first place the party may set his servant up; in the second not.

III. Right of the Bailor and Bailee to Bring Suit[3]

CHAMBERLAIN v. WEST.

(Supreme Court of Minnesota, 1887. 37 Minn. 54, 33 N. W. 114.)

MITCHELL, J.[4] This action was brought to recover the value of a diamond scarf-pin alleged to have been stolen from plaintiff's room while a guest at the West Hotel. It appeared from the evidence that the plaintiff was not the general owner of the pin, but that a year or two previous he had borrowed it from a friend, who, he says, "loaned it to him for ten years." The plaintiff had a verdict for the full value of the property. The defendant's contention is—First, that plaintiff, being a mere gratuitous bailee, had no such interest in the property as would entitle him to recover; and, second, even if he could maintain an action, he could only recover the value of his special property in the thing.

Nothing is better settled than that, in actions for torts in the taking or conversion of personal property against a stranger to the title, a bailee, mortgagee, or other special property man is entitled to recover full value, and must account to the general owner for the surplus recovered beyond the value of his own interest, but as against the general owner or one in privity with him he can only recover the value of his special property. 1 Sedg. Dam. note a; 1 Suth. Dam. 210; Jellett v. St. Paul, M. & M. R. Co., 30 Minn. 265, 15 N. W. 237; Russell v. Butterfield, 21 Wend. (N. Y.) 300; Mechanics' & T. Bank v. National Bank, 60 N. Y. 40; Atkins v. Moore, 82 Ill. 240; Faloln v. Manning, 35 Mo. 271. A mere depositor or gratuitous bailee may maintain such an action. The bailee may maintain it, although not responsible to the general owner for the loss. This he may do, not only against one who has tortiously converted the property, but also against one through whose negligence or failure of duty it has been lost; as, for example, a common carrier or innkeeper. Edw. Bailm. § 37; Faulkner v. Brown, 13 Wend. (N. Y.) 63; Moran v. Portland

[3] For discussion of principles, see Doble, Bailm. & Carr. § 39.

[4] Part of the opinion is omitted.

Steam-Packet Co., 35 Me. 55; Finn v. Western R. Co., 112 Mass. 524, 17 Am. Rep. 128; Kellogg v. Sweeney, 1 Lans. (N. Y.) 397; Id., 46 N. Y. 291, 7 Am. Rep. 333. * * *

ORSER v. STORMS.

(Supreme Court of New York, 1826. 9 Cow. 687, 18 Am. Dec. 543.)

* * * At the trial, it appeared that the plaintiff's daughter was married to an intemperate husband about 19 years before; the plaintiff promised his daughter two cows when she went to housekeeping with her husband, which was about two years after, when the plaintiff, in order to secure to her the use of two cows, loaned them to her and her husband; and they had the cows with their increase afterwards. Two of the cows and the calf in question were the stock of the old cows loaned. The other cow in question was loaned by him to his daughter about three years before the trial. The two cows first loaned had been killed by the husband, and one of them sold by the consent and direction of the plaintiff; and the daughter and her husband purchased another cow with the avails with the like consent. The other was used in the family. The old cows, or their young, had continued in the family from the time of their being loaned; were used and exchanged for others as occasion required, always with the concurrence of the plaintiff. * * *

SAVAGE, C. J.[5] The first question to be considered is, whether the plaintiff had such a property in the cattle as to be able to maintain trespass? For this purpose, he must have had the actual or constructive possession at the time; and the latter is, when he has such a right as to be entitled to reduce the goods to actual possession at any time. Root v. Chandler, 10 Wend. (N. Y.) 110, 25 Am. Dec. 546; Putnam v. Wyley, 8 Johns. (N. Y.) 435, 5 Am. Dec. 346; Bac. Abr. Trespass (C.) 2; 1 T. R. 480. As to one of the cows there is no question; and as to the residue, he does not seem ever to have relinquished his property; nor had his son-in-law the use of the cows for any specific time. He no doubt intended the cows for the use of his daughter; but did not mean to place them where her husband or his creditors, could dispose of them. He acted according to the dictates of humanity; and will be protected by law, while he retains the right of the property in himself, as that draws after it the right of possession. In my opinion the plaintiff had a right to bring his action, and must recover, unless the defendant had a right to distrain the cattle. * * *

[5] Parts of the statement of facts and of the opinion are omitted.

IV. Degree of Care to be Exercised by the Bailee [6]

FORTUNE v. HARRIS.

(Supreme Court of North Carolina, 1859. 51 N. C. 532.)

Action of trespass on the case, tried before Manly, J., at the last Spring Term of McDowell Superior Court.

It appeared in evidence, that the horse was loaned by plaintiffs to the wife of the defendant, Harris, at that time a young woman unmarried, but of full age, to ride to Rutherford on a visit to her relations.

The horse was blind in one eye when he was loaned, and when he was returned, about eight days afterwards, the other eye was weeping and partly closed up. The horse was returned by the young woman as she came back from the visit and before reaching her home; but as she was about to walk home, it was suggested by a member of the plaintiff's family that she might ride the horse home and bring him back next day; this was assented to by plaintiffs, and she rode the horse to her father's, a short distance, and he was there put into the common horse lot surrounding the stables, where in passing around the lot, he appeared to have slipped and fallen upon a stump and broke his thigh; the lot had been used for many years as a horse lot, but was somewhat slanting, and it was wet weather.

There was no complaint made of the treatment of the horse, or of his appearance, when he was first brought back by the defendant, as she returned from her journey.

Upon the foregoing, as an assumed state of facts, the Court was of opinion there was not proof of such negligent use, or of such want of care, as to make defendant responsible for the accident.

The plaintiffs contended, that as the injury had occurred to the animal while in the possession of the defendant, that a misuser of it was to be presumed; but the Court did not think so, especially in the face of the proofs. The plaintiffs, in deference to the opinion of the Court, submitted to a nonsuit and appealed.

PEARSON, C. J. It is not necessary for us to enquire, whether, if one borrows a horse, and it is injured so that it cannot be returned in as good condition as when received, the onus of proving how the injury occurred, is upon the bailor or bailee; for admitting that, as the bailment was for the benefit of the bailee alone, she was liable for slight neglect; and admitting also, that the onus of exculpation,

[6] For discussion of principles, see Dobie, Bailm. & Carr. § 40. Besides the cases under this heading, see, also, Bennett v. O'Brien, ante, p. 56, and Beller v. Schultz, ante, p. 57.

by disproving any degree of neglect on her part, was on the defendant, we concur with his Honor, that upon the state of the facts, assumed, she was not guilty of even slight neglect, as the damage was the effect of a mere accident.

Judgment affirmed.

BAILMENTS FOR THE MUTUAL BENEFIT OF THE BAILOR AND BAILEE—THE HIRED USE OF THINGS

I. Use of the Bailed Chattels by the Bailee [1]

HICKOK v. BUCK.

(Supreme Court of Vermont, 1850. 22 Vt. 149.)

Trover for a mare and colt. Plea, the general issue, and trial by jury, June Term, 1849,—Royce, C. J., presiding.

On trial the plaintiff gave in evidence a lease of a farm to himself from the defendant, dated March 8, 1847, to be cultivated upon shares for one year, by the terms of which he was to furnish the plaintiff with a pair of oxen and a horse, to be used in carrying on the farm, and proved, that, at about the commencement of the term, the defendant put upon the farm the mare in question, for the plaintiff to use, that this was the only horse furnished by the defendant, or used by the plaintiff for that purpose, and that in October, 1847, which was during the term, the defendant, against the will of the plaintiff, took away and sold the mare, without furnishing any other horse for the plaintiff to use,—the plaintiff then insisting to the defendant, that he needed the mare to use. The court instructed the jury, that if they found, that the defendant placed the mare upon the farm in pursuance of the contract on his part, and that she was accepted by the plaintiff, as the horse to be used by him in carrying on the farm, the plaintiff acquired an interest in the possession and use of the mare, which would entitle him to sustain this form of action against the defendant for wrongfully taking away the mare,—especially if another horse were not substituted in her place; and that, if they found the mare was taken away by the defendant without consent of the plaintiff, and against his will, no other horse being substituted for him to use, he was entitled to recover just damages for the loss of the use of the mare upon the farm for the remainder of the term. Verdict for plaintiff. Exceptions by defendant.

KELLOGG, J. This was an action of trover for a mare and colt, and it appeared upon the trial, that the defendant, on the eighth of March, 1847, leased to the plaintiff a farm for the term of one year, and agreed to furnish a pair of oxen and a horse to carry on the same. That at the commencement of the term, the defendant put upon the farm the mare in question for the plaintiff to use in carry-

[1] For discussion of principles, see Doble, Bailm. & Carr. § 47.

ing on the same, and that it was the only horse furnished by the defendant or used by the plaintiff for that purpose. That in October, 1847, the defendant took the mare away from the plaintiff, without his consent, and against his will, and sold her, without furnishing any other horse for the plaintiff to use; and that the plaintiff objected to the defendant's taking the mare, and insisted, that he was entitled to the use and possession of her under the lease, and that he needed her.

The defendant now insists, that for the act of taking the mare from the plaintiff the action of trover cannot be maintained,—that by the terms of the lease he was only bound to furnish a horse, and that his neglect so to do would only subject him to an action for breach of the contract. It must be conceded, that had the defendant neglected to put a horse upon the farm agreeably to his stipulation in the lease, the plaintiff could only have obtained redress for such neglect by an action for breach of the contract. But the defendant having placed the mare upon the farm in pursuance of the agreement, the plaintiff, having accepted her for the purpose therein specified, became bailee of the mare, coupled with an interest and a right to retain her during the term of the demise. The plaintiff had done nothing to forfeit this right, and the defendant could not, upon his own mere volition, put an end to the bailment. An invasion of this right of the plaintiff, by taking the mare against his will and before the expiration of the bailment, was a tortious act, for which the action of trover may well be sustained. The general property in the mare remained in the defendant, but by the bailment the plaintiff acquired a special property in her, and was entitled to the exclusive use and control of her, during the continuance of the lease. And the defendant's interference in the matter, by taking the mare against the will of the plaintiff, is to be regarded the same, as though done by one who had no interest in her.

This disposes of the only question raised, and as we find no error in the proceedings of the court below, the judgment of the county court is affirmed.

HARTFORD v. JACKSON.

(Superior Court of Judicature of New Hampshire, 1840. 11 N. H. 145.)

Assumpsit, for the use of a boat, or schooner, let to the defendant by the plaintiff for the term of five months from the 20th of June, 1838, at $13 per month, payable at the expiration of each month from that date.

The rent falling due for the boat on the 20th of July, and August, was duly paid, and this suit was brought to recover the rent due for the month ending the 20th of September.

The defendant plead the general issue.

It was conceded that the rent falling due in September was unpaid; but the defendant contended that no liability for such rent existed against him, for the reason that the boat was withdrawn from his custody and control by attachment and removal of the same by the creditors of the plaintiff before the 20th of September. * * *

UPHAM, J.[2] It is perfectly clear that an attaching creditor can take no greater interest by his attachment, and exercise no greater rights over property taken, than the debtor himself could. If we can determine, then, the precise rights of the bailor in the case before us, and the extent to which he might go in asserting any claim over the boat or schooner bailed, we shall fix the limits and powers of an attaching creditor over the same property.

It is well settled that the bailee has the exclusive right to property during the time of bailment, while exercising this right according to the terms and conditions of such bailment. This right is not only exclusive against third persons, but against the owner of the property, who has no right to disturb him. Story on Bailments 262; Roberts v. Wyatt, 2 Taunt. 268. If the owner disturbs the bailee in the use of the property, or if he takes it away before the bailment expires, the bailee may have trespass against the owner (Ham. N. P. 249); and of course against any other person improperly interfering with the property.

A recovery by a bailee against a trespasser is a bar to an action by the bailor for the same injury. Chesley v. St. Clair, 1 N. H. 189; Bissell v. Huntington, 2 N. H. 143. A bailor cannot maintain trover or replevin against a person who converts property bailed; because, although he has a reversionary interest, he has neither the possession or right of possession. Gordon v. Harper, 7 T. R. 9; Wheeler v. Train, 3 Pick. (Mass.) 255.

If such be the limitation of the rights of the bailor of property, and if the attaching creditor has no greater right over the property than the bailor, we see no ground for the interference of either with the property bailed in the present case.

The bailee had hired the property for five months, under an agreement to pay a certain sum monthly for its use. This contract had been fully kept by him; and while he is without fault or blame on his part, the property is attached on a suit against the bailor, and taken from the possession of the bailee. The officer making the attachment is, therefore, a mere trespasser against the bailee. He has no rightful claim to the possession of the property; and, so far as the bailee has been prejudiced, he has his remedy upon the officer.

If such be the case, the contract betwixt the bailor and bailee remains wholly undisturbed. There was nothing to show that the attachment was made through any agency, direction, or interference

[2] Parts of the statement of facts and of the opinion are omitted.

of the bailor, who is the present plaintiff. He is clearly entitled, then, to recover the amount stipulated to be paid him, until such time as the contract betwixt him and the bailee shall be legally terminated. * * *

We see nothing, then, to prevent the payment of the rent agreed to be paid by the bailee. The bailee must be held to the performance of his contract; and if others have improperly interfered with his rights, he is entitled to his remedy against them.

Judgment on the verdict for the plaintiff.

WHEELOCK v. WHEELWRIGHT.

(Supreme Judicial Court of Massachusetts, 1809. 5 Mass. 104.)

The declaration was in case, and alleged that the defendant, on the 15th of January, 1806, hired a horse and sleigh of the plaintiff to ride from Boston into the country four miles, and to return at seven o'clock in the evening: yet the defendant so carelessly and immoderately drove and rode the said horse and sleigh, and neglected to take proper care of said horse, and exposed him after said immoderate driving and riding for so long a time to the extreme coldness of the weather, that by means thereof the said horse died, and the said sleigh was broken, &c.

The defendant pleaded the general issue of not guilty, and the cause was tried on the review at the last November term in this county, before the Chief Justice, when a verdict was found for the plaintiff, subject to the opinion of the Court, upon the following case agreed by the parties, viz.: On the 15th of January, 1806, between 3 and 4 o'clock in the afternoon, the weather being extremely cold, the defendant hired of the plaintiff in Boston the horse mentioned in the declaration, with a sleigh, to ride to the Punch Bowl in Brookline, distant about 4½ miles, the defendant saying that he should return by 7 o'clock in the evening. No express price for the hire was agreed upon. After the defendant had rode to the Punch Bowl, and tarried there about 15 minutes, he rode on about 4½ miles further to Watertown. After staying there until past 9 o'clock in the evening, he returned with the horse and sleigh to Gen. W.'s door in Boston, one of the general's family being in the sleigh, after 10 o'clock. Having remained at the general's about five minutes, he took the horse and sleigh to return them to Wheelock; and having rode about two rods, the horse, after rearing up, fell dead on one of the shafts of the sleigh, which was broken by the fall. The sleigh was returned to Wheelock, and notice given by Wheelwright that the horse was dead. It was agreed that the defendant did not ride the horse immoderately, or neglect to feed or cover him properly with cloths.

If the Court should be of opinion that on this evidence the plaintiff

can, in this action, recover damages on account of the horse, it was agreed the verdict should stand; otherwise it should be set aside, and a general verdict entered for the defendant, and judgment be rendered accordingly.

At this term, after a brief argument by Otis and Parker for the plaintiff, and Whitman for the defendant, the opinion of the Court was delivered by

PARSONS, C. J. (after stating the action, and the facts). Upon comparing the evidence with the declaration, we are satisfied that the case agreed has negatived the gravamen alleged by the plaintiff in his declaration, and that in this action the plaintiff cannot recover.

The defendant, by riding the horse beyond the place for which he had liberty, is answerable to the plaintiff in trover. For thus riding the horse is an unlawful conversion; and if the horse had been returned to the plaintiff, the defendant might have given it in evidence, in mitigation of damages. As the horse was not returned, the defendant might have recovered the value of the horse in damages. What that value was, must be settled by a jury. If the horse in fact labored under a mortal distemper, although unknown before his death, the damages would have been the value of a horse so diseased. But it would have been incumbent on the defendant to have proved that from any causes the horse was not worth the apparent value; and if he failed to satisfy the jury of the reduced value, the plaintiff ought to recover the apparent value.

According to the facts, the plaintiff's action is misconceived. It should have been trover, and not case for improperly using the horse. And if this verdict should stand, it would not be a bar to an action of trover for a conversion by riding the horse to a place without the contract.

The verdict must be set aside, and a general verdict entered for the defendant.

DOOLITTLE et al. v. SHAW.

(Supreme Court of Iowa, 1894. 92 Iowa, 348, 60 N. W. 621, 26 L. R. A. 366, 54 Am. St. Rep. 562.)

Action for the recovery of the value of a horse. Verdict for plaintiffs. Defendant appeals.

KINNE, J.[3] * * * 2. On Sunday, September 4, 1892, defendant hired of plaintiffs a team of horses and a buggy to drive from Delhi to Manchester and return. After arriving at Manchester he drove six or seven miles into the country. He then returned to Manchester, where he let one Luke Connelly drive the team to the fair ground and back, after which defendant and Connelly started on the

[3] Parts of the opinion are omitted.

return trip to Delhi, and when about midway between the two places one of the horses was taken sick and died. * * *

3. The court gave the jury the following instruction: "(9) If you find from the evidence that the team was hired or given to defendant only for the purpose of driving from Delhi to Manchester, and that, being so hired, defendant, without the consent of plaintiffs, drove some miles away from the line of travel between said towns, to a place not contemplated by the contract of hire, then such use of the team would be a conversion of the same by the defendant, and the plaintiffs might elect to recover the value of any part of such team and buggy as was not returned to and accepted by them after knowledge of such conversion; and plaintiffs would have a right to recover, if you find such to be the fact, even though the evidence disclosed that the contract of hire by which defendant secured possession of the property was made on Sunday." The instruction lays down the broad rule that a mere diversion from the line of travel, or going beyond the point for which the horse was hired, will, without more, amount to a conversion of the animal, for which an action will lie. What will amount to a conversion in such cases is the question we must determine.

In Spooner v. Manchester, 133 Mass. 270, 43 Am. Rep. 514, the court defined a conversion as follows: "Conversion is based upon the idea of an assumption by the defendant of a right of property, or a right of dominion over the thing converted, which casts upon him all the risks of an owner; and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting, or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover unless done with the intention to deprive the owner of it permanently or temporarily, or unless there had been a demand for the property, and a neglect or refusal to deliver it, which are evidence of a conversion." Evans v. Mason, 64 N. H. 98, 5 Atl 766. In Story on Bailments, § 413, after stating the rule as to what is a conversion in such cases, it is said: "But, although this is the general rule, a question may arise, how far the misconduct or negligence or deviation from duty of the hirer will affect him with responsibility for a loss which would and must have occurred, even if he had not been guilty of any such misconduct, negligence, or deviation from duty." He also, in the same connection, says: "The question, therefore, in the present state of authorities, must still be deemed open to controversy. Wherever it is discussd it will deserve consideration, whether there is, or ought to be, any difference between cases where the misconduct of the hirer amounts to a technical or an actual conversion of the property to his own use, and cases where there is merely some negligence or omission

or violation of duty in regard to it, not conducing to the loss." Schouler, Bailm. p. 137, referring to this same matter, says: "It is not difficult to conceive that the technical misuse might occur without an actual abuse of the terms of hire, and where it would be harsh to visit deviation with such disastrous penalties."

We are not willing to give our sanction to the broad, and, when applied to a case like that at bar, harsh, rule of the instruction. It must be borne in mind that, in almost every case where that strict rule has been applied, the facts have shown that the hirer, in addition to departing from the contract line of travel, was guilty of negligence or of willful misconduct, or that he injured or destroyed the property while outside of the limits of the contract of hiring. Schouler, Bailm. p. 137; Farkas v. Powell, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397. In the case last cited, the action was for the value of a horse which had died, and which it was alleged defendant had ridden beyond the place he had hired him to go, and that by negligence or cruelty the horse had been so injured as to cause his death. The horse was hired to ride from Albany to the Whitehead place, in the country, a distance of five miles, and was to be returned by 11 o'clock at night. When defendant arrived at the Whitehead place, he learned that the person he wished to see was at the Bryant place, three or four miles further on, and he rode on to that place. He remained there two hours and a half, and left about 9:30 p. m. for Albany. On the return, and between Whitehead place and Albany, the horse fell in the road. He got the horse up on his feet, and led him three miles, when he again fell. After getting him on his feet again, he put him in a lot near by, and went into town, and notified the plaintiff where the horse was, and of his condition. The horse died. It appeared that, when the defendant got the horse to go upon his journey, he was sound and in good condition, and showed no signs of disease. The defendant showed that he rode the horse moderately. It was held that there was a technical conversion of the horse, and, if the horse had been injured while beyond the point to which he was hired to go, defendant would have been liable, whether the injury was caused by his own negligence or by the negligence of others, or even by accident, unless he was forced to go beyond by reason of circumstances he could not control. The court said: "But the main question in this case is, would Powell, after having been guilty of a technical conversion or violation of his duty, and having returned within the limits of the original hiring, and the horse then sustained an injury without other fault on his part, be liable? That would depend, in our opinion, upon whether the extra ride of six or eight miles to the Bryant place and back caused or materially contributed to the accident. If it did, we think he would be liable to the owner. * * * If, however, the extra ride did not cause or materially contribute to the injury, we do not think Powell would be liable, if guilty of no other fault."

In Harvey v. Epes, 12 Grat. (Va.) 153, the contract was one for the hire of slaves for a year, to work in a certain county. They were taken by the hirer, without the owner's consent, to another county, and employed in the same kind of work, and while there died. The court, after elaborately discussing the question and fully considering the authorities, held that the removal of the slaves to a county other than that to which they were hired to work in was not of itself a conversion, regardless of whether their death was caused by such wrongful act or not. It said: "Upon the whole, I am of the opinion that, in the case of a bailment for hire for a certain term, * * * the use of the property by the hirer, during the term, for a different purpose, or in a different manner, from that which was intended by the parties, will not amount to a conversion for which trover will lie, unless the destruction of the property be thereby occasioned, or at least unless the act be done with intent to convert the property, and thus to destroy or defeat the interest of the bailor therein. * * * A bailment upon hire is not conditional in its nature, any more than any other contract; and, in the absence of an express provision to that effect, the bailee will not, in general, forfeit his estate by a violation of any of the terms of the bailment. * * * If he merely uses the property in a manner, or for a purpose, not authorized by the contract, and without destroying it, or without intending to injure or impair the reversionary interest of the bailor therein, such misuse does not determine the bailment, and therefore is not a conversion for which trover will lie." See, also, Pars. Cont. p. 128.

In Cullen v. Lord, 39 Iowa, 302, the action was for the recovery of the value of a horse loaned to defendant, and which it was averred was killed by the defendant's overdriving and illtreatment. It was held that the jury should have been instructed that, in the absence of a contract to the contrary, the law implied an agreement to pay for the use of the horse. The evidence tended to show that plaintiff gave defendant certain instructions and directions respecting the time of starting, and the manner of caring for the horse. An instruction of the lower court to the effect that, if plaintiff gave instructions and directions, and did not afterwards waive them, and defendant did not follow them, he would be liable, without inquiry as to whether the injury resulted from a failure to obey the instructions or from some other cause, was held as erroneous as applied to a case of letting for a reward.

While the facts in that case, so far as they appear, are not like those in the case at bar, still we think there is a clear recognition of the doctrine that, in cases of a letting for reward, a mere violation of the contract, without more, will not fix a liability as for a conversion. To constitute a conversion in a case like that at bar, there must be some exercise of dominion over the thing hired, in repudiation of, or inconsistent with, the owner's rights. We hold that the mere act of de-

viating from the line of travel which the hiring covered, or going on beyond the point for which the horse was hired, are acts which, in and of themselves, do not necessarily imply an assertion of title or right of dominion over the property inconsistent with, or in defiance of, the bailor's interest therein.

As there was nothing to show that the defendant, in violating the terms of the contract, intended to appropriate the property temporarily or permanently to his own use, or that he did in fact so appropriate it, or exercise acts of dominion over it inconsistent with plaintiffs' rights, he should not be held liable for its value from the mere fact that he drove the horse beyond or outside of the journey for which he was hired. Nor do we see that the rule we have stated is fraught with danger in its application to other cases that may arise. We are not called upon to determine as to whether or not the defendant would have been liable if, under proper issues and evidence, it had been shown that the extra driving caused or contributed to the death of the horse, as no such case is presented. As to the fact that the contract was entered into on Sunday, we do not think it is at all controlling. The action is not based upon the contract, but upon the theory that defendant converted the property to his own use. If he did so, he was not acting under the contract, but independent of it. We discover no error in the eleventh instruction. For the reasons given, the case is reversed.

II. Interest of the Bailee—Right to Bring Suit [4]

LITTLE v. FOSSETT.

(Supreme Judicial Court of Maine, 1852. 34 Me. 545, 56 Am. Dec. 671.)

The plaintiff was riding with a wagon and harness, which he had hired of Dr. Clark. The defendant, in traveling with another carriage, negligently drove against the wagon, and thereby injured the wagon and the harness.

To recover for that injury, this action of trespass was brought by the bailee.

The defendant requested instruction to the jury, that if Dr. Clark owned the articles, and if the plaintiff had but a temporary possession, the plaintiff cannot recover for any permanent injury done to them.

This request was denied, and the jury was instructed that the plaintiff, by having the possession, was entitled to recover the entire damage done to the articles. The defendant excepted.

[4] For discussion of principles, see Doble, Bailm. & Carr. § 48.

APPLETON, J. The law seems to be well settled that the bailee of personal property may recover compensation for any conversion of, or any injury to, the article bailed while in his possession. The longer or shorter period of such bailment, the greater or less amount of compensation—and whether such amount is a matter of special contract or is a legal implication from the beneficial enjoyment of the loan, does not seem to affect the question. "The borrower has no special property in the thing loaned, though his possession is sufficient for him to protect it by an action of trespass against a wrongdoer." 2 Kent's Com. 574. By the common law, in virtue of the bailment, the hirer acquires a special property in the thing during the continuance of the contract and for the purposes expressed or implied by it. Hence he may maintain an action for any tortious dispossession of it or any injury to it during the existence of his right. Story on Bail. § 394. In Croft v. Alison, 4 Barn. & Ald. 590, the court held that the plaintiffs, who had hired the chariot injured, for the day, and had appointed the coachman and furnished the horses, might be deemed the owners and proprietors of the chariot, and as such might recover of the defendant for the injury it had sustained from his negligent driving. In Nicolls v. Bastard, 2 Cromp. M. & R. 659, it was decided that, in case of a simple bailment of a chattel without reward, its value might be recovered in trover either by the bailor or bailee, if taken out of the bailee's possession.

The bailee is entitled to damages commensurate with the value of the property taken or the injury it may have sustained, except in a suit against the general owner, in which case his damages are limited to his special interest. "If," say the court, in White v. Webb, 15 Conn. 302, "the suit is brought by a bailee or special propertyman against the general owner, then the plaintiff can recover the value of his special property; but if the writ is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest, in trust for the general owner." This view of the law seems fully confirmed by the uniform current of authority. Lyle v. Barker, 5 Bin. (Pa.) 457; Ingersoll v. Van Bokkelin, 7 Cow. (N. Y.) 670; Chesley v. St. Clair, 1 N. H. 189; 2 Kent's Com. 585.

The instructions given were correct. The exceptions are overruled, and judgment is to be rendered on the verdict.

III. Assignability of the Bailee's Interest [5]

BAILEY v. COLBY.

(Supreme Judicial Court of New Hampshire, 1856. 34 N. H. 29, 66 Am. Dec. 752.)

This was an action of trespass quare clausum, and for taking, driving away and converting to his own use, two steers alleged to be the property of the plaintiff.

The defendants pleaded the general issue severally, and filed several brief statements, in which they set forth that the steers were the property of the defendant, L. Colby, and that he, in his own right, and the other as his servant, entered the plaintiff's close peaceably, doing no damage, and drove away the steers.

The entry of the plaintiff's close, and taking and driving away the steers therefrom, were admitted by the defendants.

To prove that the steers were the property of L. Colby, the defendants introduced evidence tending to prove that in the fall of 1850 said L. Colby sold the steers to one Young, on condition that the steers should remain his own property, till Young paid for them; that Young paid $5.75 only, and then sold the steers, August 25, 1851, to the plaintiff, who had been frequently informed before he purchased them of Young, that Colby had a claim to the steers till they were paid for. And after the plaintiff purchased the steers of Young, he saw Colby once or twice, who informed him of his said claim to the steers, and on the 29th of said August, Young and the plaintiff, the plaintiff having provided himself with money, went to see Colby to settle up for the steers. At this time the dealings between Colby and Young were talked over, and the plaintiff, in the presence of Young, saying he had the money, offered to pay Colby what was due on the steers, which it appeared was the sum of $12.25; but that Colby refused to take it, unless he would pay him in addition what Young was owing him on all other matters between them, amounting to about $10. The plaintiff refused to do this, and the defendants, on the 10th of September following, entered the plaintiff's close, peaceably and quietly, and took and drove away the steers.

The court intimating to the defendants' counsel, that upon this evidence they should rule that the plaintiff was entitled to recover, a verdict was taken for him, by consent, for the value of the steers, and interest from the time of taking; to be set aside, amended, or judgment rendered thereon, as the Supreme Judicial Court shall order.

[5] For discussion of principles, see Doble, Bailm. & Carr. § 49.

BELL, J.[6] It was held in the case of Sargent v. Gile, 8 N. H. 325, that if a bailee for hire for a limited period, sell the goods before the expiration of the term, the bailment is thereby ended, and the owner may maintain trover, if the vendee refuses to deliver them up on demand; and it will not alter the case if the bailee had by his contract a right to purchase the goods within the term by paying a certain price. The case was carefully considered, and the numerous authorities cited fully sustain the conclusions of the court. Unless, then, it shall appear that there are exceptions to this general rule, to which the attention of the court was not called in that case, the rule then laid down must govern and conclude the case before us. * * *

In the great mass of bailments the reason which governs in the case of estates at will would be found to apply. The nature of the bailment, the objects to be effected by it, forbid that the bailee should have, or should be regarded as having any assignable interest. Wherever this should be found to be the case, any attempt by the bailee to assign any interest in the property bailed, would be regarded as putting an end to the bailment on the part of the bailee, and the assignee would acquire no interest by the assignment, and would be liable to the action of the bailor, as a mere stranger would be. Such are all the cases where the bailment can properly be regarded as a personal trust in the bailee, and such in general are all those cases where the bailment is at will, that is, during the pleasure of both the parties.

But there is a large class of bailments, where the bailment is accompanied with other contracts or stipulations which affect its character, and give to the bailee other rights, not incident to a simple bailment, and where there is no personal confidence, and none of the characters of an estate at will, and where it would be entirely consistent with the analogies existing in the case of real estate, to hold that the bailee has an assignable interest, which may be transferred to a third person, and where such an assignment, upon the common principles governing the courts, would be enforced and protected as between the parties, and as against all persons whose interests are not injuriously affected by the transfer.

Of the cases which present themselves as falling within this class, would be the case of a pledge, or pawn, where there is ordinarily nothing like personal confidence, and the contract is in no sense determinable at the pleasure of a party, but the bailee has an interest, or, as it might be said, a quasi estate in the goods till they shall be redeemed.

In the same class would fall all the various cases of lien, where the bailee has a right, as against the bailor, to insist upon the possession of the property, until the lien is duly discharged by payment or the performance of other conditions.

[6] Part of the opinion is omitted.

In all cases of this character it might well be contended that a pledge is an incident of the debt, and passes with it upon its transfer. Southerin v. Mendum, 5 N. H. 420; Whittemore v. Gibbs, 24 N. H. 484.

But the law seems to be well settled in the case of the pawn, that the pawnee may sell and assign all his interest in the pawn, or he may convey the same interest conditionally by way of pawn to another person, without in either case destroying or invalidating his security. Moses v. Canham, Owen, 123; Ratcliffe v. Davis, 1 Buls. 29; s. c. Yel. 178; Cro. Ja. 244; Jackson, J., in Jarvis v. Rogers, 15 Mass. 389, 408; Mann v. Shipner, 2 East, 523; McComb v. Davis, 7 East, 6, 7; Goss v. Emerson, 23 N. H. 42; Cross on Lien, 72.

But if the pledgee should undertake to pledge the property (not being negotiable securities,) for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he was absolute owner, it is clear that in such case he would be guilty of a breach of trust, and his creditor would acquire no title (beyond that held by the pawnee, says Story, Bailm. 215). It would admit of controversy whether the creditor could retain the pledge till the original debt was discharged, and whether the owner might not recover the pledge, as if the case was a naked tort without any right in the first pledgee.

In the case of liens it is settled that a factor, having a lien on goods consigned to him for sale, for advances, or for a general balance, has no right to pledge the goods generally, and if he does he conveys no right to the pledgee. But it is admitted that the factor has a right to assign or deliver over the goods as a pledge or security to the extent of his own lien thereon, if he avowedly confines his assignment or pledge to that, and does not exceed his interest. Mann v. Shipner, 2 East, 523–529; McComb v. Davis, 7 East, 6, 7; Kenkein v. Wilson, 4 B. & A. 443; 1 Bell, Com. 483; 2 Bell, Com. 95; Urquhart v. McIver, 4 Johns. (N. Y.) 103; 2 Kent, Com. 626; Story, Bail. 216; Whitwell v. Wells, 24 Pick. (Mass.) 31.

The case of letting to hire may fall in either of the two classes into which, for our present purpose, we have divided bailments. Such a letting may be at will, or it may partake of the character of a license, or personal confidence, in either of which cases the hirer will have no assignable interest. But it may also be a letting for a fixed time, and without restriction or limitation from which any personal confidence may be inferred. It may be in terms to the party or his assigns, or the character of the use may be such as necessarily to imply that the property may be assigned. And in every such case the hirer may be deemed to have an assignable interest. Thus, a party may lease his farm for years, with the stock and tools upon it. The whole lease, it can hardly be doubted, may be assigned. A party may let furnished lodgings for a term; the lessee has an assignable interest in the furniture. A sheriff, who seizes such interest on execution is liable to the lessor neither in trover nor trespass. Putnam v.

Wyley, 8 Johns. (N. Y.) 432–435, 5 Am. Dec. 346; Ward v. McAuley, 4 D. & E. 489; Gordon v. Harper, 7 D. & E. 9; Edw. Bail. 314. So a party who should lease his livery stable, with his stock of horses and carriages, for a term of years, could hardly complain if the lessee should assign his interest, unless some restriction was introduced in the lease. And the shipowner who should let his vessel for a year, could hardly object if the charterer should assign his interest to another pending the term.

Applying these principles in the present case, the result would be, that as the interest of Young was not a simple bailment, terminable at the pleasure of the parties, and as it rested on no personal confidence, but was connected with a contract, which gave him a right to keep the steers and use them till he paid for them, if he did that in a reasonable time; and to the absolute title to the property whenever such payment should be made, he had an assignable interest in the steers, a right to sell his interest, or, in other words, a right to sell the property, subject to the claim of Colby, the defendant. If his sale was of his interest only, he had done no wrong, and his assignee, the plaintiff, was entitled to hold the property as he held it by his contract; and Colby had no right to resume the property from Bailey, more than he had from Young himself, until the reasonable time for payment had passed, and until after he had requested payment without success.

When Bailey, the plaintiff, went with Young to Colby, before any demand made for payment, and tendered him the balance due for the steers, the property became at once vested in Bailey, and Colby had no longer any right to interfere with it, and he was a trespasser, as any stranger would be, for taking it away. Colby had no right to ask payment of any other claim he had against Young; and Bailey, to perfect his title, was bound only to pay the amount Colby had agreed to take for the steers.

But if the sale by Young was a sale of an absolute title to the steers, in disregard of the claim of Colby, Colby might treat the contract with Young as violated, and the bailment at an end, and resume the property at once, doing no unnecessary damage and using no violence, without liability for any damage for the taking, or for any entry on land of Young or Bailey to obtain possession of it.

The cases on this subject are none of them inconsistent with our views, so far as we have discovered. The case of Sanborn v. Coleman, 6 N. H. 14, 23 Am. Dec. 703, was of the hiring of a mare for four weeks, and *a sale absolute* to the defendant a few days after. It was held that the sale was wrongful and a conversion, which authorized the plaintiff to consider the contract at an end, and to claim possession of the mare wherever she could be found.

In Sargent v. Gile, before cited, the plaintiffs delivered furniture to one Wilson upon a contract that he should keep it six months, and if in that time he paid for it, he was to have it; otherwise he was to

pay an agreed price for the use of it. Wilson sold and delivered the furniture to the defendants, who knew nothing of the contract, but bought the property supposing it to be his, and the bailment was ended, and the bailor might recover the goods in trover. The case of Lovejoy v. Jones, 30 N. H. 165, was of a similar character.

In Vincent v. Cornell, 13 Pick. (Mass.) 294, 23 Am. Dec. 683, oxen were sold to be returned on a fixed day, unless a certain sum was paid. The buyer sold the oxen, and the court held that the original buyer had a right to dispose of the possession with his right, such as it was, and the sale did not terminate the bailment.

In Loeschman v. Machin, 2 Stark. 311, where the hirer of a piano sent it to an auction to be sold, it was held a conversion; and it is apparent the transfer could not have been limited to the hirer's interest merely. Wilkinson v. King, 2 Camp. 335, presents the same point, and Samuel v. Morris, 6 C. & P. 620, Emerson v. Fisk, 6 Greenl. (Me.) 200, 19 Am. Dec. 206, and Galvin v. Bacon, 11 Me. 28, 25 Am. Dec. 258.

The case of Davis v. Emery, 11 N. H. 230, tends to support our view of the law. It was there held that when a cow was taken under a contract that she was to remain the plaintiff's property till paid for, and she was bailed by the buyer to another person to keep, no action could be maintained against such bailee, till demand of the price, and of the animal. And the case of Nash v. Mosher, 19 Wend. (N. Y.) 431, fully sustains it; where it was held generally, that a party having a lien upon goods may transfer the possession, subject to the lien, to a third person, who may lawfully hold the property until the lien is paid; but if the transferee sells the goods, the owner is remitted to his original rights, freed from the lien, and may bring trover against him.

Upon the facts reported in the case, which was evidently tried without any distinct reference to the distinction we make, it seems most probable that the sale was a rightful sale, made with the knowledge on both sides of Colby's interest, and subject to the performance of the contract with him. This was the view of the court upon the trial, and the verdict was taken by consent upon an intimation of that opinion.

It was a question proper for the jury whether the sale was of Young's interest merely; but that does not seem to have been made a question. Unless it is supposed there is room for a controversy upon this fact, there must be judgment on the verdict.

IV. Degree of Care to be Exercised by the Bailee[7]

WISECARVER v. LONG & CAMP.

(Supreme Court of Iowa, 1903. 120 Iowa, 59, 94 N. W. 467.)

LADD, J.[8] On the 21st day of March, 1900, Long & Camp, who are merchants engaged in business at Fairfield, hired a livery team and light wagon of plaintiff, which their employé, Roy Fry, drove to Glasgow, a distance of about 12 miles. The object of the trip was to nail up advertising boards on the way and at that place. Incidentally a young lady, who has since become Fry's wife, rode with him. They left Fairfield within an hour from 12:15 o'clock p. m., and returned between 5:30 and 6:45 o'clock the same evening. One of the horses died before midnight, and the evidence tended to show that the other could not be used for several weeks, and was of much less value than before the drive. On the part of plaintiff, the evidence introduced tended to show that the horses had perspired freely, but that the sweat had dried on them when they came in; that the one which died bore whip marks on its rump; that though the roads were bad the trip was made in about 4½ hours, and that the horses appeared to have been exhausted by overdriving. On the other hand, defendants' evidence tended to show that the team was not urged or whipped, that the roads were good save in low places, and that journey was not made in less than 6½ hours. * * * *

2. The plaintiff of necessity relied largely on proof of the condition of the team when taken and when returned, with the inferences reasonably to be drawn therefrom. He was not bound to point out the specific respect in which Fry was negligent, save that it was in the management of the team, or the particular place where the neglect occurred. This was the thought in the fifth instruction refused, which was as follows: "If you find from the evidence that the plaintiff's horses, which were hired to the defendants, were injured while in the possession of the defendants by the lack of such care as an ordinarily prudent man would give under like circumstances, then the defendants are liable for the injuries so done to said horses, though the evidence may not have shown to you when or where the overdriving or other want of care took place. It is sufficient if the evidence shows that the horses were actually injured by the lack of proper care in the management and driving, if such lack of care is shown by their condition when returned by the defendants, though the proofs may not point out the exact spot at which, or the time when, the horses suffered by such mismanagement or want of care."

[7] For discussion of principles, see Dobie, Bailm. & Carr. § 53.

[8] The statement of facts and parts of the opinion are omitted.

The horses were shown to have been healthy, five and nine years old, accustomed to going long distances, and to have been returned, after a few hours' drive, in a dying condition. From these circumstances, and the unusual result, the jury might well have inferred that they were the dumb victims of such cruelty or indifference on the part of their driver as amounted to negligence. If their changed condition was not such as might reasonably have been caused by a drive of that distance in a prudent manner, and was such as would ordinarily have resulted from overdriving or other misuse, we see no reason for not considering this fact as tending to establish negligence on the part of the person handling them.

3. Fry testified, in substance, that he took no notice of the horses. Plaintiff requested the court to instruct that: "It is the duty of the defendants' employé in driving the plaintiff's team to exercise such care and watchfulness for them and their condition as a man of ordinary prudence would exercise while driving them, and if such employé failed to exercise such watchful care over the horses, and in fact did not notice their condition, and that they were becoming exhausted, when he might have observed that fact by the exercise of such care, and continued to drive them until they were exhausted, such lack of oversight and watchfulness was negligent, and defendants are responsible for it, and the injury shown by the evidence to have resulted therefrom." This instruction ought to have been given. The distance driven was 24 or 25 miles, and the jury might have found from the evidence that the employé failed to exercise proper care in observing the team and how they were enduring the drive. * * *

MILLER et al. v. MILOSLOWSKY.

(Supreme Court of Iowa, 1911. 153 Iowa, 135, 133 N. W. 357.)

Action to recover damages to moving picture films. Verdict and judgment for the plaintiffs. The defendant appeals.

SHERWIN, C. J.[9] The plaintiffs herein leased to the defendant certain moving picture films, to be used in the defendant's theaters at Des Moines and Ft. Dodge, and to be returned to the plaintiffs at Chicago. The films were delivered to the defendant in good order, but when they were received by the plaintiffs upon their return to Chicago, they were in a damaged condition, and this suit resulted. * * *

The appellant is mistaken in the assertion that there was no evidence showing that the defendant was negligent in handling or using the films. The films were securely inclosed when they were delivered to the express company for shipment to the plaintiffs in Chicago,

[9] Parts of the opinion are omitted.

and when they reached there and came into the hands of the plaintiffs the package was unbroken, and evidently in the exact condition that it was in when delivered to the express company by the defendant's agent. It was opened by the plaintiffs, and the films were carefully removed therefrom and examined, and were found to be in the damaged condition complained of. There was also evidence tending to show that the condition in which they were found could only have been produced by negligent use and handling. If the films were in a damaged state when they reached Chicago, and it was apparent that they must have been in the same condition when they were boxed and shipped, the jury was justified in finding that they had been injured through the defendant's negligence, for it was conceded that the defendant received them from the plaintiffs in good condition. What we have already said sufficiently answers the appellant's contention that there was error in the court's instructions. The evidence as to the condition of the package when it reached the plaintiffs in Chicago, and as to the condition of the films when they were removed therefrom, was clearly competent.

The testimony of one of the plaintiffs' witnesses that the "scratches were extended the whole length of the film, showing there was some defect in the machine, the sprocket holes were torn out, showing that the machine had not been properly handled," we think, was properly received. The witness had had long experience with such films, and with their use and handling. In other words, he was an expert in the business, and we think he was shown fully competent to give an opinion as to what caused the injury to the films. Ordinary jurymen know nothing about such matters, or how such films are used or operated. Moreover, the defendant's evidence tended to show that films may be damaged by the use of defective machines and by improper handling. The evidence sustains the verdict, and the judgment should be, and it is, affirmed.

Affirmed.

SINISCHALCHI v. BASLICO.

(Supreme Court of New York, Appellate Term, 1905. 92 N. Y. Supp. 722.)

Action by Guiseppe Sinischalchi against Amiello Baslico. From a Municipal Court judgment in favor of defendant, plaintiff appeals.

SCOTT, J. The defendant was a bailee for hire, and as such was bound to exercise a reasonable degree of care to guard against injury to the property. The fact that the lease contemplated that the lessee was not to be held liable by reason of damage from the elements did not excuse defendant from the exercise of due care, and did not cover extraordinary and unusual damage from wind and rain, which would have been avoided if the defendant had not been negligent. The damage by the elements contemplated by the lease

was such damage as might naturally be looked for under the circumstances of the nature and use of the article leased, and which might result notwithstanding the exercise by defendant of proper and reasonable care. The condition in which the organ was found showed damage far beyond what may be deemed to have been contemplated by the lease, and cast upon defendant the burden of showing that he had in point of fact used the requisite care. This burden he did not sustain. Indeed, the uncontradicted testimony is to the effect that on a very rainy night he left the organ not only uncovered, but actually open on the top, thus inviting the very injury which followed. He cannot shield himself from the consequences of his negligence by claiming, because the storm was a severe one, that the injury resulted from an act of God, and therefore that he was excused. The storm was undoubtedly of considerable, although not unprecedented, severity; yet there is nothing to indicate that the severity of the storm was the sole cause of the damage, or that it would have produced so much damage if defendant had fulfilled his duty with regard to caring for the property. We cannot avoid the conclusion that the court below may have underestimated the extent of the responsibility cast upon the defendant, and consider that justice will be best served if the case be retried.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

V. Liability of the Bailee for the Acts of his Agents or Servants [10]

GANNON v. CONSOLIDATED ICE CO.

(Circuit Court of Appeals of United States, Second Circuit, 1899. 91 Fed. 539, 33 C. C. A. 662.)

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel in personam to recover for injury to a canal boat. There was judgment for libelant, and defendant appeals.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Gannon let to the Consolidated Ice Company, the appellant, his canal boat, for a per diem compensation, to be used in the transportation of ice. The appellant then contracted with one Sheehey to tow the boat from Troy to Crescent, on the Erie Canal,

[10] For discussion of principles, see Dobie, Bailm. & Carr. § 54.

at the rate of seven dollars per trip. Sheehey was regularly engaged in the towing business, and he employed his own men and used his own horses in conducting it. While he was towing the boat, it was, by the negligence of his servants, run against a pier and injured. The appellant disclaims responsibility for the damage, insisting that Sheehey was an independent contractor, and, as his servants were not its servants, it is not liable for their acts.

The liability of the appellant does not rest upon the ground that the boat was injured by its servants, but upon the ground that it was injured by its subusers. They were not trespassers or strangers, but were using the boat, by the permission of the appellant, for the purposes of its bailment. The appellant could not absolve itself from its duty as bailee to take proper care of the boat by delegating that duty to another. The hirer of property is liable, not only for his own personal default or negligence in its custody, but also for that of any other person whom he permits to use it. Schouler, Bailm. § 145; Story, Bailm. § 400. The precise question now presented was considered by this court in Smith v. Bouker, 1 U. S. App. 80, 1 C. C. A. 481, 49 Fed. 954, and decided adversely to the contention of the appellant. Of the cases cited by the appellant to sustain his contention, the only ones in point are Jackson v. Easton, 7 Ben. 191, Fed. Cas. No. 7,134, and McLoughlin v. New York Lighterage & Transportation Co., 7 Misc. Rep. 119, 27 N. Y. Supp. 248.

We find nothing in the reasoning of these cases to lead us to depart from our conclusions in Smith v. Bouker. The decree is affirmed, with interest and costs.

VI. The Compensation of the Bailor [11]

WILKES v. HUGHES.

(Supreme Court of Georgia, 1867. 37 Ga. 361.)

John D. Wilkes, as guardian of the minors and orphans of Jefferson R. Westburry, sued Hughes, upon an open account for $301.00 for hire of a negro (Ben) from 28th December, 1864, to 25th December, 1865. * * *

After the argument, the Court charged the jury they should find for the plaintiff so much, with interest, as it was proven the negro's services were worth, while he served as a slave. * * *

HARRIS, J.[12] Until the adoption of our Code, the rigor of the common law principles relative to contracts of bailment, admitted of no

[11] For discussion of principles, see Doble, Bailm. & Carr. § 55.

[12] Parts of the statement of facts are omitted.

modification. A spirit of equity, consonant with the impulses of conscience, was wisely infused into our present system; indeed it was impossible to pretermit ample and just provision for apportionment in such a case as this, without marring the obvious purpose of the codifiers, that of rendering the principles and practice of the two sides of the Superior Courts as near as practicable, alike.

This was a contract for the hire of a negro for the year, 1865. It is an historic fact known to the world that, with the capitulation of the armies of the Southern Confederacy, and the military occupation of Georgia in April, 1865, slavery practically ceased. The owner could not any longer exercise dominion or control over his slave. The military authorities not only would not countenance any control, they absolutely prohibited any attempt to hold slaves involuntarily to service.

By a force not to be resisted, and to which the rights of the people of Georgia had to succumb as they were a conquered people and at the mercy of the conqueror, Hughes, the defendant, the hirer of the negro Ben, had, like other whites, to yield. By the effect of the war and this military compulsion, he lost from April, 1865, the services of the negro Ben for the remainder of the year, and without any fault on his part. These facts bring his defense clearly within the provisions and equity of the Code, and we affirm the judgment below, apportioning the hire in this case of bailment.

BAILMENTS FOR THE MUTUAL BENEFIT OF THE BAILOR AND BAILEE—HIRED SERVICES ABOUT THINGS

I. Interest of the Bailee [1]

BURDICT v. MURRAY.

(Supreme Court of Vermont, 1830. 3 Vt. 302, 21 Am. Dec. 588.)

This was an action of trespass for taking and carrying away a quantity of sheep skins and goat skins. * * * A contract had been made between Allen Murray and Warren Murray and the plaintiffs, by which the Murrays were to furnish four thousand skins annually for three years, to be tanned and dressed into morocco by the plaintiffs, and were to pay the plaintiffs therefor twenty-seven and a half cents for each skin. * * * Under this contract the skins in question had been delivered to the plaintiffs; and after they had been partly dressed and were in an unfinished state, the said Allen and Warren Murray turned them out to the defendant, Harvey Murray, a creditor, who caused them to be attached and taken away, on a writ of attachment against said Allen and Warren. The plaintiffs contended they had a lien on the skins for the labor already bestowed in dressing them, and other skins delivered on said contract, and also for the labor they were afterward to bestow in completing them. * * *

There was a verdict for the plaintiffs and the defendants excepted.

PRENTISS, C. J.[2] It is the better opinion that he who has a special property in the goods may have an action of trespass against him who has the general property, and upon the evidence the damage shall be mitigated. Thus a bailee of a chattel for a certain time, coupled with an interest, may support the action against the bailor for taking it away before the time. 1 Chit. Pl. 170. There is no doubt, therefore, but that the plaintiffs in the case before us, if they had a special property in the skins, were entitled to maintain this action, and recover according to their interest, although the skins were turned out to the defendants, on the writ of attachment, by Allen and Warren Murray, the owners.

The plaintiffs, under the contract with the Murrays, were bailees having an interest, and had a right to retain the skins for the purpose for which they were bailed to them. Until the skins were dressed and made into morocco, the plaintiffs were entitled to the pos-

[1] For discussion of principles, see Doble, Bailm. & Carr. § 61.

[2] Parts of the statement of fact are omitted.

session of them; and even then they would have a lien upon the skins for the price agreed to be paid for their labor upon them. A workman who has bestowed his labor upon a chattel has a lien for the remuneration due to him, whether the amount was fixed by the express agreement of the parties or not; though it is otherwise if, by the bargain, a future day of payment was agreed upon, for then the detention of the chattel would be inconsistent with the terms of the contract: Chase v. Westmore, 5 Man. & Sel. 180. Here there was no particular time or mode of payment agreed upon, and if the plaintiffs had completed the manufacture of the skins according to the agreement, they would have had an unquestionable right to detain them until the price was paid, unless they had already in their hands a balance sufficient to pay the price. But the skins were in an unfinished state, and the plaintiffs had a right, under the contract, to retain them to earn the price. If at the time of taking the skins the Murrays had offered and agreed to allow the plaintiffs the full price stipulated to be paid for furnishing them, out of moneys actually in the plaintiffs' hands sufficient to pay the price, it might have been a good defense. But as no such offer appears to have been made, the evidence proposed by the defendants could not avail them.

Judgment affirmed.

WILSON v. MARTIN.

(Supreme Judicial Court of New Hampshire, 1860. 40 N. H. 88.)

FOWLER, J.[a] * * * In the case at bar, Page had a lien upon the harnesses in controversy, for the labor and expense he had bestowed in cleansing and oiling them, at his election, and had a right to retain the possession and control of them until his charge in that behalf should be paid. He claimed his lien and asserted his right, and still so claims and asserts his interest in the goods. He has never parted with the possession of the harnesses, and still rightfully holds them against the plaintiff and all the world. By his assertion of his lien, his right to retain the possession of the harnesses, for the payment of his charges, became vested, and must so continue as long as he shall retain that possession. He manifestly did not waive or intend to waive his lien, in consenting to hold the harnesses for the defendant. He only received and agreed to hold them subject to his own lien; and the defendant consented that Page should so receive and hold them, and that he would not as an officer interfere with them until that lien should be discharged; so that the lien was not affected or impaired by the arrangement. Townsend v. Newell, 14 Pick. (Mass.) 332.

[a] The statement of facts and parts of the opinion have been omitted.

The gist of trespass to personal property is the injury done to the plaintiff's possession. The substance of the declaration is, that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff. To maintain the action, it is absolutely essential that the plaintiff should have had, at the time of the alleged injury, either actual or constructive possession of the property injured. His possession is constructive when the property is either in the actual custody and occupation of no one, but rightfully belongs to himself; or when it is in the care and custody of his servant, agent, or overseer, or in the hands of a bailee for custody, carriage, or other care or service, as a depositary, mandatary, carrier, borrower, or the like, where the bailee or actual possessor has no vested interest or right to the beneficial use or enjoyment of the property, or to retain it in his possession, but the owner may take it into his own hands at pleasure. But, where the general owner has parted with the actual possession, in favor of one who enjoys the exclusive right of present possession and enjoyment, retaining to himself only a reversionary interest, the possession is that of the lessee or bailee, who alone can maintain an action of trespass for a forcible injury to the property. 1 Ch. Pl. (7th Ed.) 188, 195; 2 Gr. Ev., §§ 613, 614, 616, and authorities cited; Clark v. Carlton, 1 N. H. 110; Poole v. Symonds, 1 N. H. 289, 8 Am. Dec. 71; Heath v. West, 28 N. H. 101; Moulton v. Robinson, 27 N. H. 550; Marshall v. Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463; Nash v. Mosher, 19 Wend. (N. Y.) 431; Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 45; Gay v. Smith, 38 N. H. 171.

In this case, the plaintiff had parted with his possession of the harnesses, by delivering them to Page, to be cleaned and oiled. Page had cleaned and oiled them, and he thereby acquired, and had asserted the right, to retain them in his possession, even as against the plaintiff, until his charges for the labor and expense bestowed upon them should be satisfied. The plaintiff, then, had neither possession or the right of possession in the harnesses, at the time of the alleged injury to them, and could not maintain trespass. Cowing v. Snow, 11 Mass. 415, and authorities cited above. * * *

II. The Compensation of the Bailee [4]

KAFKA v. LEVENSOHN.

(Supreme Court of New York, Appellate Term, First Department, 1896. 18 Misc. Rep. 202, 41 N. Y. Supp. 368.)

McADAM, J.[5] The action was originally brought to recover for work, labor, and services in making up 488 men's coats at the agreed price and of the reasonable value of 50 cents per coat, making $244. On account of this sum the plaintiff received $82, and this, together with $2.43 for insurance, having been deducted, left a balance of $159.57, the amount originally sued for. It appeared that the 488 coats came in four lots, of 221, 100, 50, and 117, respectively; that the two first lots had been delivered, while the third lot had been stolen from the plaintiff after the goods were made up ready for delivery. * * *

As to the fifty coats: As a general rule, when a bailee fails on demand to deliver to the bailor property to which the latter is entitled, the presumption of liability arises, and if the goods cannot be found it furnishes the imputation of negligence as the cause. Fairfax v. Railroad Co., 67 N. Y. 11. But such prima facie case may be overcome when it is made to appear that the loss was occasioned by some misfortune or accident not within the control of the bailee. Then the onus continues on the bailor to prove that it was chargeable to the want of care of the bailee. Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Mills v. Gilbreth, 47 Me. 320, 74 Am. Dec. 487; Stewart v. Stone, 127 N. Y. 506, 28 N. E. 596, 14 L. R. A. 215. The work on the 50 coats was completed February 24, 1896, at half past 2, and the defendant's expressman, who generally brought and took away the work from the plaintiff's shop, was notified to call for that lot at 3 o'clock. He neglected to call, and during the night the room was broken into and the coats stolen. It was a taking by force, and the thieves also stole property from rooms of other occupants of the same house. It appeared that on leaving for the day the plaintiff had securely locked his rooms, and that there was no want of diligence on his part. These facts completely exonerated the bailee. Edw. Bailm. 147, 446; Lawson, Bailm. § 43. Certain legal consequences follow such a loss. If it had occurred through the negligence of the plaintiff, he would have been answerable to the defendant for the value of the property taken, but, as it happened without his fault, he is entitled to recover for the work done. Halyard v. Dechelman, 29 Mo. 459, 77 Am.

[4] For discussion of principles, see Dobie, Bailm. & Carr. § 62.
[5] Parts of the opinion are omitted.

Dec. 585. The rule is that if while work is doing on a thing belonging to the employer, and the thing perishes by internal defect or inevitable accident, without any default of the workman, the latter is entitled to compensation to the extent of his labor actually performed on it, unless his contract import a different obligation; for the maxim is, "Res perit domino." Story, Bailm. § 421; 2 Kent, Comm. 590, 591; Schouler, Bailm. § 111. And see Hayes v. Gross, 9 App. Div. 12, 40 N. Y. Supp. 1098.

In Cohen v. Moshkowitz, 17 Misc. Rep. 389, 39 N. Y. Supp. 1084, it appeared that the employer was in a hurry for his goods; that the workman promised to send them to his employer at an appointed time, but neglected to keep his agreement, and the goods were subsequently destroyed on the workman's premises. The loss was in consequence attributed to his neglect, and on that account it was held that he could not recover for the work done. That feature is not only absent here, but the evidence points to the neglect of the defendant's expressman as a responsible cause of the loss which subsequently happened. The evidence on that subject is not clear, yet, in view of the finding of the justice, may bear that interpretation. * * *

BRITTON v. TURNER.

(Superior Court of Judicature of New Hampshire, 1834. 6 N. H. 481, 26 Am. Dec. 713.)

Assumpsit for work and labor, performed by the plaintiff, in the service of the defendant, from March 9, 1831, to December 27, 1831. * * *

PARKER, J.[6] It may be assumed, that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year, for the sum of one hundred and twenty dollars, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract.

It is clear, then, that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

But the question arises, can the plaintiff, under these circumstances, recover a reasonable sum for the service he has actually performed, under the count in quantum meruit?

Upon this, and questions of a similar nature, the decisions to be found in the books are not easily reconciled.

It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to

[6] Parts of the statement of facts and opinion are omitted.

fulfil the contract by performing the whole labor contracted for, is not entitled to recover any thing for the labor actually performed, however much he may have done towards the performance, and this has been considered the settled rule of law upon this subject. Stark v. Parker, 2 Pick. 267, 13 Am. Dec. 425; Faxon v. Mansfield, 2 Mass. 147; McMillan v. Vanderlip, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; Jennings v. Camp, 13 Johns. 94, 7 Am. Dec. 367; Reab v. Moor, 19 Johns. (N. Y.) 337; Lantry v. Parks, 8 Cow. (N. Y.) 63; Sinclair v. Bowles, 9 Barn. & Cres. 92; Spain v. Arnott, 2 Stark. Rep. 256.

That such rule in its operation may be very unequal, not to say unjust, is apparent.

A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such nonperformance, which in many instances may be trifling—whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance—although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage—is in fact subjected to a loss of all which has been performed, in the nature of damages for the non fulfillment of the remainder, upon the technical rule, that the contract must be fully performed in order to a recovery of any part of the compensation.

By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action.

The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant as found by the jury is $95, if the defendant can succeed in this defence, he in fact receives nearly five sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff—a sum not only utterly disproportionate to any probable, not to say possible damage which could have resulted from the neglect of the plaintiff to continue the remaining two and a half months, but altogether beyond any damage which could have been recovered by the defendant, had the plaintiff done nothing towards the fulfilment of his contract. * * *

We hold then, that where a party undertakes to pay upon a spe-

cial contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it, and where the parties have made an express contract the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties. * * *

But if, where a contract is made of such a character, a party actually receives labor, or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to "recover on his new case, for the work done, not as agreed, but yet accepted by the defendant." 1 Dane's Abr. 224.

If on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has in such case received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing the law cannot and ought not to raise an implied promise to pay. But where the party receives value—takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. Farnsworth v. Garrard, 1 Camp. 38. And the rule is the same whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor, from time to time until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case—it has still been received by his assent.

In fact we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover any thing dependent upon it—that the contract being entire there can be no apportionment, and that there being an express contract no other can be implied, even upon the subsequent performance of service—is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe, that the general understanding of

the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary. * * *

Applying the principles thus laid down, to this case, the plaintiff is entitled to judgment on the verdict. * * *

STEEPLES v. NEWTON.

(Supreme Court of Oregon, 1879. 7 Or. 110, 33 Am. Rep. 705.)

BOISE, J.[1] The respondent in this case alleges in his complaint that he performed labor for appellant in ditching, and alleges his labor to be of the value of $73.80, and claims a balance to be due him of $62 and interest, for which he demands judgment.

The appellant answered, and in his answer alleges that whatever labor the plaintiff performed for him was performed under and in pursuance of a written contract between the parties, which contract is set out in the answer. The appellant alleges that the respondent has not completed said contract; that he has not dug the said ditches mentioned in the contract, or any part thereof, according to the terms of the contract, and that all said ditches were, at the commencement of this action and at the date of the answer, uncompleted and unfinished, without appellant's fault. * * *

The second instruction objected to is as follows: "If the plaintiff abandoned his contract without cause, he is entitled to recover the reasonable value of his labor, subject to the offset by the damages sustained by defendant by reason of plaintiff's non-performance of his contract."

The determination of the propriety of this instruction presents a vexed question, on which the authorities are not uniform.

The Circuit Court seems to have followed the rule laid down in the text in 2 Parsons on Contracts, 523, which is supported by the authority of the case of Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713, where it was held that where one party, without the fault of the other, fails to perform his contract for labor in such a manner as to enable him to sue upon it, still, if the party for whom the labor is performed had derived a benefit from the part performed, the party so failing may recover the reasonable value of such labor. That was a case of indebitatus assumpsit for work and labor. "The defendant offered evidence to prove that the work was done under a contract to work for one year for the sum of one hundred dollars, and that the plaintiff left his service without his consent, and without good cause." The learned judge instructed the jury that although all the points should

[1] Parts of the opinion are omitted.

be made out, yet the plaintiff was entitled to recover under his quantum meruit as much as the labor performed was reasonably worth, and this instruction was held correct. This case seems not to have been followed in other states. It is quoted and discussed in the case of Olmstead v. Beal, 19 Pick. (Mass.) 529, where the court say that they have no hesitancy in adhering to the rule before established in Massachusetts, which is supported by a long series of adjudications. It was held in the case of Fenton v. Clark, 11 Vt. 557, where the plaintiff contracted with the defendant to labor for four months, at ten dollars per month, and not to receive any pay until he had worked the four months, and before the time was out became disabled and unable to perform the work, that his sickness being the act of God, the contract was discharged, and he could recover the reasonable value of his labor; and the same was held in the case of Seaver v. Morse, 20 Vt. 620. The same rule is also held in Massachusetts. (Fuller v. Brown, 11 Mass. 440; and Olmstead v. Beal, 19 Pick. 529, above cited.) The latter rule is as it was announced by this court at this term in the case of Tuboa and McPhee v. J. M. Strowbridge, where the decision of the question was not necessary to a determination of the case, and was consequently obiter; "that where one performs services for another on a special contract, and for any reason, except a voluntary abandonment, fails to fully comply with his contract, and such compliance becomes impracticable, and the service has been of value to him for whom it was rendered, he may recover for such service its reasonable value, after deducting therefrom any damages the party for whom the service was performed has sustained by reason of such failure."

Since deciding that case, we have more fully considered this very important subject, and think the rule here laid down to be just and reasonable, and it is supported by most of the modern authorities. To adopt the rule that in all cases a party shall be held to a literal compliance with his special contract before he can recover anything for labor, is too harsh, and would often be unjust; and on the other hand, to hold to the rule as stated in the case of Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713, that a person may voluntarily abandon his special contract, and lose nothing thereby, would have a tendency to encourage bad faith, and lessen the sacredness of solemn obligations, which it is the duty of the courts to uphold and enforce, so far as the same can be done without doing manifest injustice. It would be unjust to require a total performance in cases where the party in default has bestowed his labor for the benefit of his employer, and fails fully to comply with the terms of his contract from some accident or misfortune which does not involve willful neglect or abandonment on his part. We think, therefore, that this instruction of the Circuit Court was incorrect, and might have influenced the verdict of the jury to the damage of the appellant. * * *

III. The Lien of the Bailee on the Bailed Goods [8]

STEINMAN v. WILKINS.

(Supreme Court of Pennsylvania, 1844. 7 Watts & S. 466, 42 Am. Dec. 254.)

The plaintiff brought this action of trover against the defendant, who is a warehouseman in Clarion county, on the Allegheny river, for the supposed conversion of certain goods retained for the price of warehouse room, being part of a larger lot which was stored in his warehouse by Hamilton & Humes, of whom the plaintiff is the general assignee. The greater part had been delivered to Hamilton & Humes, and the residue having been demanded without tender of any charges, McCalmont (President of the Common Pleas of Clarion county) directed the jury that though the defendant could not retain for the general balance of his account, he might retain for all the charges on all the goods forwarded to him at the same time.

GIBSON, C. J.[9] Though a plurality of the barons in Rex v. Humphery, 1 McCle. & Yo. 194, 195, dissented from the dictum of Baron Graham, that a warehouseman has a lien for a general balance, like a wharfinger, I do not understand them to have intimated that he has no lien at all. They spoke of it as an entity; and seem to have admitted that he has a specific lien, though not a general one. There is a well-known distinction between a commercial lien, which is the creature of usage, and a common law lien, which is the creature of policy. The first gives a right to retain for a balance of account; the second, for services performed in relation to the particular property. Commercial or general liens, which have not been fastened on the law merchant by inveterate usage, are discountenanced by the courts as encroachments on the common law; and for that reason it would be impossible to maintain the position of Baron Graham, for there is no evidence of usage as a foundation for it, and no text-writer has treated a warehouse room as a subject of lien in any shape. In Rex v. Humphery, it was involved in the discussion only incidentally; and I have met with it in no other case. But there is doubtless a specific lien provided for it by the justice of the common law. From the case of a chattel bailed to acquire additional value by the labor or skill of an artisan, the doctrine of specific lien has been extended to almost every case in which the thing has been improved by the agency of the bailee. Yet, in the recent case of Jackson v. Cummins, 5 Mee. & W. 342, it was held to extend no further than to cases in which the bailee has directly conferred additional value by labor or skill, or

[8] For discussion of principles, see Doble, Bailm. & Carr. § 64.

[9] Part of the opinion is omitted.

indirectly by the instrumentality of an agent under his control; in supposed accordance with which it was ruled that the agistment of cattle gives no lien. But it is difficult to find an argument for the position, that a man who fits an ox for the shambles, by fattening it with his provender, does not increase its intrinsic value by means exclusively within his control. There are certainly cases of a different stamp, particularly Bevan v. Waters, Moo. & M. 235, in which a trainer was allowed to retain for fitting a race-horse for the turf.

In Jackson v. Cummins we see the expiring embers of the primitive notion that the basis of the lien is intrinsic improvement of the thing by mechanical means; but if we get away from it at all, what matters it how the additional value has been imparted, or whether it has been attended with an alteration in the condition of the thing? It may be said that the condition of a fat ox is not a permanent one; but neither is the increased value of a mare in foal permanent; yet in Scarfe v. Morgan, 4 Mee. & W. 270, the owner of a stallion was allowed to have a lien for the price of the leap. The truth is, the modern decisions evince a struggle of the judicial mind to escape from the narrow confines of the earlier precedents, but without having as yet established principles adapted to the current transactions and convenience of the world. Before Chase v. Westmore, 5 Maule & Selw. 180, there was no lien even for work done under a special agreement; now, it is indifferent whether the price has been fixed or not. In that case, Lord Ellenborough, alluding to the old decisions, said that if they "are not supported by law and reason, the convenience of mankind certainly requires that our decisions should not be governed by them;" and Chief Justice Best declared in Jacobs v. Latour, 5 Bingh. 132, that the doctrine of lien is so just between debtor and creditor, that it cannot be too much favoured. In Kirkham v. Shawcross, 6 T. R. 17, Lord Kenyon said it had been the wish of the courts, in all cases and at all times, to carry the lien of the common law as far as possible; and that Lord Mansfield also thought that justice required it, though he submitted when rigid rules of law were against it. What rule forbids the lien of a warehouseman? Lord Ellenborough thought in Chase v. Westmore, that every case of the sort was that of a sale of services performed in relation to a chattel, and to be paid for, as in the case of any other sale, when the article should be delivered.

Now, a sale of warehouse room presents a case which is bound by no pre-established rule or analogy; and, on the ground of principle, it is not easy to discover why the warehouseman should not have the same lien for the price of future delivery and intermediate care that a carrier has. The one delivers at a different time, the other at a different place; the one after custody in a warehouse, the other in a vehicle; and that is all the difference. True, the measure of the carrier's responsibility is greater; but that, though a consideration to influence the quantum of his compensation, is not a consideration to

increase the number of his securities for it. His lien does not stand on that. * * * Now, neither the carrier nor the warehouseman adds a particle to the intrinsic value of the thing. The one delivers at the place, and the other at the time, that suits the interest or the convenience of the owner of it, in whose estimation it receives an increase of its relative value from the services rendered in respect of it, else he would not have undertaken to pay for them. I take it, then, that, in regard to lien, a warehouseman stands on a footing with a carrier, whom in this country he closely resembles.

Now, it is clear from Sodergren v. Flight and Jennings, cited 6 East, 612, that where the ownership is entire in the consignee, or a purchaser from him, each parcel of the goods is bound, not only for its particular proportion, but for the whole, provided the whole has been carried under one contract; it is otherwise where to charge a part for the whole would subject a purchaser to answer for the goods of another, delivered by the bailee with knowledge of the circumstances. In this instance, the entire interest was in Hamilton & Humes, in whose right the plaintiff sues; and the principle laid down by the presiding judge was substantially right. On the other hand, the full benefit of it was not given to the defendant in charging that the demand and refusal was evidence of conversion. There was no evidence of tender to make the detention wrongful; and the defendant would have had cause to complain, had the verdict been against him, of the direction to deduct the entire price of the storage from the value of the articles returned, and to find for the plaintiff a sum equal to the difference. But there has been no error which the plaintiff can assign.

Judgment affirmed.

WILES LAUNDRY CO. v. HAHLO et al.

(Court of Appeals of New York, 1887. 105 N. Y. 234, 11 N. E. 500, 59 Am. St. Rep. 496.)

RAPALLO, J.[10] * * * The uncontroverted facts were as follows: Hoexter was a manufacturer of collars and cuffs, and the plaintiff carried on the business of laundering for manufacturers. In June, 1884, Hoexter, through his representative, Mr. Kupfer, stated to the agent of the plaintiff that he was about manufacturing a superior line of goods, on which he desired to have the laundry work of the plaintiff, and asked the plaintiff's agent whether the plaintiff could take the job, and the agent replied that the plaintiff could. An agreement was thereupon entered into verbally between them that the plaintiff should do the laundry work on all collars and cuffs Hoexter should deliver to the plaintiff, at the price of 16½ cents per dozen, payable in cash as follows: That on the first of each month the plain-

[10] Parts of the opinion are omitted.

tiff should render a bill for all goods laundered and returned to Hoexter during the preceding month, and should receive payment in cash; that cash was not to be paid at the time the goods were actually delivered to Hoexter, but cash on the first of each month for goods returned the previous month; that there was no fixed period during which the goods were to be delivered to be laundered, but only until notice by either party; that the plaintiff might at any time refuse to do any more goods, and Hoexter might refuse to deliver any fresh goods if he chose; and, whenever Hoexter should desire a general settlement and clearing out of the goods, he should shut down for 10 days, and not send any more work, and give the plaintiff a chance to get everything out of the laundry. It usually took seven or eight days to complete the process of laundering the goods. Under this agreement Hoexter began sending goods to the plaintiff's laundry about the eighteenth of June, 1884, and the business continued until the sixth of April, 1885, when it was discontinued on account of the failure of Hoexter, * * * and on the sixth of April, 1885, there was a balance unpaid to the plaintiff for work, including this protested draft, of $1,747.72, and the plaintiff had on hand between 2,400 and 2,500 dozen cuffs and collars of Hoexter. * * *

If, under the agreement between the plaintiff and Hoexter, the plaintiff acquired any lien upon the goods laundered, we think that this lien attached to any goods which the plaintiff had in its possession at the close of the dealings, and to the extent of the whole balance then due to the plaintiff for work done, as well upon the particular goods remaining in the plaintiff's possession as upon those which it had previously returned to Hoexter. All the work was done under a single contract, and the lien attached to all goods delivered to the plaintiff under that contract. By returning a portion of those goods to Hoexter, the plaintiff waived only its lien upon the goods so returned, retaining it for its full amount upon the residue which remained in its possession. This consequence results from the entirety of the contract under which the goods were delivered to the plaintiff to be laundered. If each lot of goods had been delivered to the plaintiff under a separate contract, it would have acquired only a lien upon the particular lot of goods so delivered, and only for the work done on that particular lot of goods; and, when that lot was returned to the manufacturer, the plaintiff, by parting with possession, would have destroyed its lien on that lot of goods, and could not transfer it to any other lot received under a separate contract. But, where property is delivered for the purpose of having work done thereon which adds to its value, it makes no difference that the deliveries take place at different times, provided they are all made under a single contract. The lien attaches to all the property, in the same manner as if it had all been delivered at one time; and, if part of it is voluntarily returned without payment for the work, the only consequence is that the person doing the work has abandoned a part of his security for

the total amount due him, and retained his lien therefor only upon the property which remains in his possession. * * *

But all these cases are subject to the condition that there is nothing in the contract for doing the work inconsistent with the right of lien; and that where a particular future time of payment is fixed, which may be subsequent to the time when the owner is entitled to a return of the article upon which the work is done, there can be no lien; and that, where the parties contract for a particular time or mode of payment, the workman would have no right to set up a right to possession inconsistent with the terms of his contract; and in such a case there is no lien. 5 Maule & S. 186, 187. In the present case the legal effect of the contract was that the collars and cuffs should be returned to Hoexter as fast as laundered. On this construction the parties acted throughout their dealings. Laundered goods were returned, as a general rule, every day during each month. The plaintiff had no right to demand pay for each lot delivered at the time of delivery. The only witness to the contract testifies expressly that such was not the agreement; but, on the contrary, that it was that on the first of each month Hoexter should pay for the goods which had been laundered and returned during the preceding month. It is clear that the return of the goods to Hoexter was to precede the right to demand payment for the work by a longer or shorter period, according to circumstances, but certainly some period of time. This is entirely inconsistent with the theory of a lien, as has often been adjudged. * * *

IV. The Degree of Care to be Exercised by the Bailee [11]

MICHIGAN STOVE CO. v. PUEBLO HARDWARE CO.

(Supreme Court of Colorado, 1911. 51 Colo. 160, 116 Pac. 340.)

GABBERT, J.[12] * * * It is next urged that the counterclaim should not have been allowed because the evidence does not establish that plaintiff was guilty of such negligence or want of care in handling the goods of the Holmes Hardware Company as would render it responsible. This contention is based upon the assumption that plaintiff was a gratuitous bailee, and therefore only required to exercise slight care or diligence. The premise is not justified from the record. We think the testimony unquestionably establishes that plain-

[11] For discussion of principles, see Doble, Bailm. & Carr. § 65.

[12] Parts of the opinion are omitted.

tiff was a bailee for hire, and that there was a valuable consideration for the services it undertook to perform.

These services were also for the benefit of the Holmes Hardware Company, so that the case falls within the rule that, when a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect. Story on Bailments, § 23; Dart v. Lowe, 5 Ind. 131.

"Ordinary care" is that degree of care which an ordinarily prudent person would exercise under similar circumstances.

Whether or not the plaintiff exercised this degree of care was submitted to the jury, and, from the verdict returned, determined against it. The only question, then, is whether the testimony is sufficient to sustain that finding. We think it is. The goods were delivered by the firm from whom purchased upon the platform, from which they would be loaded into the car. The employés of plaintiff knew when these goods were delivered, and of what they consisted. They were there at the time. The platform was without a roof. Plaintiff admits that it received the goods in good condition. Before they were loaded into the car, it rained, and this was the cause of the damage. The bulk of the damage consisted in injury to bundles of planished iron, which were badly rusted. This kind of iron is easily injured by water, and was therefore packed so that, when placed "right side up," the bundles are impervious to rain. The bundles containing this iron were marked on the waterproof side: "Keep dry. This side up." On the opposite side they were marked: "The other side up. Keep dry." If these directions had been followed, injury to the iron could have been avoided. The goods of the plaintiff on the platform at the same time were not injured by the rain; so that it seems, from all the facts and circumstances, there was sufficient evidence from which the jury could well determine that by the exercise of reasonable and ordinary care injury to the goods could have been prevented. * * *

STUDEBAKER BROS. MFG. CO. v. CARTER et al.

(Court of Civil Appeals of Texas, 1908. 51 Tex. Civ. App. 331, 111 S. W. 1086.)

TALBOT, J.[18] * * * The undisputed evidence shows that appellee's carriage was in appellant's possession for the purpose of being repaired. Appellant did not have the facilities for repairing it in its own establishment, and it was necessary, and so known to appellee at the time the carriage was delivered to appellant, that appellant would have to send it to another party in the city to have the repairs made. For this purpose, it became necessary to have the carriage hauled from

[18] Parts of the opinion are omitted.

appellant's warehouse to the repairing establishment. This could only be done by making use of the street, and to use the street it was necessary to place the vehicle in it. There was a box car standing on a switch track of the Texas & Pacific Railway Company in front of appellant's warehouse, adjoining the sidewalk, and the carriage was placed in the street as close by the side of the box car as it could be placed. Immediately upon placing the carriage in the street appellant telephoned to a local expressman to come and take it to the repairer, and it had not been standing in the street exceeding five minutes when the runaway horse of the Pacific Express Company, which was hitched to a wagon, ran against the carriage and injured it. The placing of the carriage in the street was only temporary, and appellant's employé who put it there did so with the intention of leaving it only long enough to walk across the street and procure the material for its repair, which was to accompany it to the repairer's. This employé had scarcely left the vehicle for the purpose of getting the material mentioned, when the accident happened. There were at least 50 feet of the street in the clear for the passage of vehicles between where the carriage was situated and the other side of the street. The driver of the horse and wagon which ran into and injured appellee's carriage, left them standing in front of another establishment to the west of appellant's warehouse. The horse was "hitched" by means of a strap and 16-pound weight attached to it, and while the driver was absent delivering some freight the horse took fright from some cause, perhaps a passing train, and ran away. There was no evidence that any employé of appellant had any knowledge of the situation or presence of the horse and wagon in that vicinity at the time the carriage was placed in the street, or while it was standing there, or that they had any reason to anticipate that any horse attached to a wagon or otherwise circumstanced, would run away and probably come in contact with appellee's carriage, or that it would by any means be injured.

The question presented then is, was the trial court justified in concluding that the appellant, in placing appellee's carriage in the street for the purpose shown, and in leaving it there for so short a time, "unguarded and unprotected," was guilty of actionable negligence? It is clear that appellant was a bailee of the vehicle for hire and required to use only ordinary care to avoid injury to it. The mere placing of the carriage in the street temporarily for the purpose intended cannot be said to be negligence, as a matter of law, and whether the leaving of it there "unguarded and unprotected," as shown, would constitute negligence rendering appellant liable for the damage sustained, depends upon whether or not appellant knew, or might reasonably have foreseen or anticipated that by so doing, it might be injured in some such way as it was. * * *

We conclude the trial court was not justified, under the circumstances shown, in holding that the appellant failed to exercise that degree of

care to prevent injury to appellee's carriage, as was required of him by law and therefore liable for the damages sought to be recovered. * * *

V. Warehousemen [14]

LEIDY v. QUAKER CITY COLD-STORAGE & WAREHOUSE CO.

(Supreme Court of Pennsylvania, 1897. 180 Pa. 323, 36 Atl. 851.)

Action by William C. Leidy against the Quaker City Cold-Storage & Warehouse Company. Judgment for plaintiff, and defendant appeals.

GREEN, J.[15] The question at issue in this case was a question of pure fact, to wit, negligence of the defendant in caring for the plaintiff's goods while in its custody. The principal facts of the case are not in controversy; that is, the fact that the plaintiff did deliver to the defendant a large quantity of chickens and squabs in September, 1893, for preservation by means of cold storage, and the fact that when these goods were removed, in the early part of the year 1894, a very considerable part of them was seriously injured by mold and decay, are well established by ample testimony, which is not contradicted. Whether the defective condition of the goods was due to the negligence of the defendant in their preservation, was the sharply contested question before the jury, which it was necessarily their proper function to decide. * * *

The only remaining question to consider is whether there was evidence more than a scintilla tending to establish the allegation of negligence against the defendant. Having read the testimony with much care, and having reference to the very subject, we are constrained to say that, in our opinion, there was an abundance of such testimony in the cause. Without stopping to repeat it in detail, it is only necessary to say that in the testimony of Leidy, Van Ostrand, Drohan, Humphrey, Bergey, Lauter, Kitchen, and Thompson—all of them examined for the plaintiff—may be found plentiful items of evidence, some on one subject and some on others, which are material, pertinent, and convincing in a greater or less degree, illustrative of the very essential point of controversy. Some of these witnesses describe the condition of the chickens and squabs when they were put in storage with Crowell & Class; some testify to their condition when taken out and removed to the defendant's storage; others to the condition in re-

[14] For discussion of principles, see Doble, Bailm. & Carr. § 67 (1).

[15] Parts of the opinion are omitted.

spect of dampness and moisture observed in the defendant's rooms; others to the condition of the goods when taken out and shipped to New York.

On the crucial question as to the condition of the room, Bergey was asked: "Q. What was the condition of the room when you were doing that sorting? A. That day the dripping trough was wet, and the pipes were damp and rusty-like in the center of the room. * * * I called Mr. Story's attention to it. The trough was wet. The pipes were also damp, and I think some of them had no snow on at all. * * * Q. The troughs were wet? A. Yes, sir; and even that floor. It was also wet at that time." Lauter, after describing the condition of the stock as being moldy, and some of it rotten, was asked: "Q. Did you see the room when you were doing that? A. Yes, sir; we also examined the room. Q. What was the condition of the room? A. The pipes were damp,—not the pipes, but the trough was damp, and the pipes were dripping. Mr. Bergey told me to look at that, and I did so." It was abundantly proved that moisture would form mold, and mold would cause rot. The condition of mold and decay of the chickens and squabs when taken out was proved by a mass of testimony, which was really not contradicted. A number of witnesses proved the good condition of the stock when it was put into the storage, and the whole subject was fully developed in a large amount of testimony, from which the jury could fairly infer all the conditions of the defendant's liability.

There was, of course, some conflicting testimony on the part of the defendant, all of which was for the consideration of the jury, but of which we can take no cognizance. We do not think that it was necessary to prove some specific act of negligence which produced the dampness or moisture. The fact that, being present, they tend to cause mold, is itself evidence of negligence in permitting such conditions. * * *

VI. Safe Deposit Companies[16]

SAFE DEPOSIT CO. OF PITTSBURGH v. POLLOCK.

(Supreme Court of Pennsylvania, 1878. 85 Pa. 391, 27 Am. Rep. 660.)

Case by A. M. Pollock, against the Safe Deposit Company of Pittsburgh, to recover the value of four United States bonds, which plaintiff alleged were lost through the negligence of defendant. The facts are fully stated in the opinion of the court.

At the trial, before Collier, J., the defendant requested the court to charge the jury ["that the burthen of proving the negligence,

[16] For discussion of principles, see Dobie, Bailm. & Carr. § 67 (3).

which the plaintiff charges against the defendant, is upon the plaintiff]; and the evidence, that upon January 27th, 1875, the plaintiff, upon unlocking the safe, rented and used by him in the burglar-proof vault of the defendant, and examining its contents, discovered that part of his bonds were missing therefrom, does not of itself establish such negligence in the defendant, although the defendant is unable to account for the alleged loss or how it happened."

The court answered: "The part in brackets is affirmed, the rest is refused."

In their general charge the court said:

"The defendant can only be held liable for want of ordinary care, and if you think, from all the evidence in the case, that the defendant exercised such care as ordinarily vigilant, prudent people would exercise under the same or similar circumstances about their own affairs, then they have done all the law required under the contract in this case; but they are bound to do that. They were bound to use, in the language of the law, ordinary care and diligence; and that is such care, diligence and vigilance as ordinarily careful and prudent persons would exercise in their own concerns in similar circumstances. You must remember the public character of this institution, what it pretends to do, what it offers to do, what its responsibilities were under its contract.

["So, we instruct you, first, that if you believe that the bonds were not in the box; that the doctor is honestly mistaken; that he might have dropped them on the counter when he was examining them, or carried them away and forgotten them, or in any other way they were kept out of the box, then the plaintiff is not entitled to recover. But if the bonds were in the box, as alleged; if the doctor is not mistaken; if the bonds were in the box, and they were missing under the circumstances as detailed by the plaintiff, he had a right then to call on the plaintiff for an explanation."]

The verdict was for the plaintiff for $4,154.12, and after judgment the defendant took this writ, assigning for error, inter alia, the answer to the foregoing point, and the portions of the charge above noted in brackets.

M. W. Acheson and J. S. & A. P. Morrison, for plaintiff in error.

The defendant was not, properly speaking, a depositary. The plaintiff's bonds were not delivered to or received by the company's employés or agents. The defendant never had actual possession of the bonds. Therefore it was error to charge that the plaintiff had a right to call upon the defendant for an explanation of how the loss occurred.

Evidence that the goods are missing, that they are not on hand when called for, does not of itself establish negligence in the bailee. Gilbart v. Dale, 5 Ad. & E. 543; Midland Railway Co. v. Bromley, 33 Eng. Law & Eq. 235; 17 C. B. 372; Harris v. Packwood, 3 Taunt. 267; Marsh v. Horne, 5 B. & C. 322, 327.

With certain exceptions as to innkeepers and common carriers, the burden of proof of negligence is on the bailor, and proof merely of the loss is not sufficient to put the bailee on his defence. Farnham v. Camden & A. R. Co., 55 Pa. 53. The case of Finucane v. Small, 1 Esp. R. 315, is analogous to this case.

Thomas M. Marshall, John H. Baily and Christopher Magee, for defendant in error.

No express contract was shown in the case of Finucane v. Small, cited by the plaintiff in error.

The question of negligence was properly left to the jury.

MERCUR, J. This action was brought against the plaintiff in error to recover for the loss of some government bonds. Its general business is indicated by its name. It took two classes of risks; in one class it became the absolute guarantor of the safety of the deposit; in the other its liability was qualified and restricted. The present case arose under the latter class. The defendant in error rented a safe in the burglar-proof vault of the company, subject, inter alia, to the following rules and regulations:

"Whenever a party rents a safe, and deposits therein at pleasure, contents not being made known to the company, its liability is limited:

"1. To the keeping of a constant and adequate guard and watch over and upon the burglar-proof safe.

"2. To the prevention of access by any renter to the safe of any other renter.

"3. To the protection of safes and contents from any dishonesty on the part of any of the company's employees."

He renewed the lease annually several times and paid the required rent. The safe is closed by an iron door, to which a lock is attached. The valuables are placed in a tin box, made to fit into the safe like a drawer. In this box and safe he placed several thousand dollars in government bonds, and had the exclusive possession of the keys to the safe.

As the interest fell due on the bonds, he took them out, cut the coupons therefrom, and replaced them in the safe and locked it again. Finally, on taking out the envelope containing the bonds for the same purpose, he discovered that four bonds, two of $1,000 each, and two of $500 each, had disappeared therefrom. The jury have found that he put them in the safe and did not remove them therefrom.

There was no evidence that the vault or the safe had been broken nor that the lock had been tampered with. These facts being unquestioned, and the bonds having been taken from the safe, it necessarily follows that it had been opened with a key suited to the lock. In order to get access to the safe a person would be obliged to step in to the vault. If he entered during business hours, one key would enable him to procure the bonds. If at other hours, it would require two keys to reach them from the office. The fact that the bonds

were taken under these circumstances, was certainly some evidence that the company had not kept "a constant and adequate guard and watch over and upon the safe," as by its agreement it was bound to do. It further agreed to prevent the access of any other renter to the safe of the defendant in error, and to protect his safe, and its contents from any dishonesty of the company's employees. If any third persons were given access to the vault under circumstances that would have enabled them to unlock the safe and remove the bonds, and they had so done, although a contingency not provided for in the agreement, yet it cannot be pretended that it would not be evidence of a want of ordinary care. So if the bonds were purloined by either renter or employee it was certainly evidence to go to the jury of an omission on the part of the company to exercise that ordinary care and vigilance which men ordinarily exercise and ought to exercise under such circumstances in the protection of their own property. The vault and the safe were in the possession and under the protection of the company. The manner in which the bonds were most probably taken, shifted the burden of proof. It threw upon the company the necessity of making some explanation to rebut its prima facie negligence. The case is not like Finucane v. Small, 1 Espinasse's Rep. 315, in which there was no express agreement as to the care to be exercised. Nor is it like Farnham v. Camden & Amboy Railroad Company, 55 Pa. 53, where it was held that proof merely of loss was not sufficient to put the bailee on his defence. The evidence in the present case of the defendant in error did not stop with merely showing the loss. It showed the bonds had been abstracted by some one entering the vault, and opening the safe by means of a key. The presumption of want of ordinary care was thereby created. All the evidence calculated to rebut that presumption was fairly left to the jury by the learned judge.

The other assignments have no merit, and were not urged in the argument. Judgment affirmed.

VII. Officers Charged with the Custody of Public Funds [17]

UNITED STATES v. PRESCOTT et al.

(Supreme Court of United States, 1844. 3 How. 578, 11 L. Ed. 734.)

McLEAN, J.[18] This action was brought in the circuit court for the district of Illinois, on a bond given by Prescott, with the other defendants as his sureties, for his faithful performance of the duties of receiver of public moneys, at Chicago, in the State of Illinois. The defence pleaded was, that the sum not paid over by the defendant,

[17] For discussion of principles, see Dobie, Bailm. & Carr. § 67 (5).

[18] The statement of facts has been omitted.

Prescott, and for which the action was brought, had been feloniously stolen, taken, and carried away, from his possession, by some person or persons unknown to him, and without any fault or negligence on his part; and he avers that he used ordinary care and diligence in keeping said money, and preventing it from being stolen.

To this plea, the plaintiffs filed a general demurrer; and on the argument of the demurrer, the opinions of the judges were opposed on the question, whether "the felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, discharged him and his sureties, and may be set up as a defence to an action on his official bond?" And this point is now before this court, it having been certified to us under the act of congress.

On the part of the defendant it is contended that the defendant, Prescott, was a depositary for hire; and that unless his liability was enlarged by the special contract to keep safely, he is only subject to the liabilities imposed by law upon such a depositary; that the special contract does not enlarge his liability.

This is not a case of bailment, and, consequently, the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond, and principles which are founded upon public policy. The conditions of the bond are, that the said Prescott has "truly and faithfully executed and discharged, and shall truly and faithfully continue to execute and discharge all the duties of said office," (of receiver of public moneys at Chicago,) "according to the laws of the United States; and moreover has well, truly, and faithfully, and shall well, truly, and faithfully, keep safely, without loaning or using, all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same had been or should be ordered, by the proper department or officer of the government, to be transferred or paid out; and when such orders for transfer or payment had been or should be received, had faithfully and promptly made, and would faithfully and promptly make, the same, as directed," &c.

The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him, when required to do so; and the question is, whether he shall be exonerated from the condition of his bond, on the ground that the money had been stolen from him?

The objection to this defence is, that it is not within the condition of the bond; and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government; how, then, can Prescott be discharged from his bond? He knew the extent of his obligation, when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle on which

such a defence can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond.

The case of Foster et al. v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, was a mere naked bailment, and of course does not apply in principle to this case. The deposit in that case was for the accommodation of the depositor, and without any advantage to the bank, as the court say, "which can tend to increase its liability. No control whatever of the chest, or of the gold contained in it, was left with the bank or its officers. It would have been a breach of trust to have opened the chest, or to inspect its contents."

Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that "he should keep safely" the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practised with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defence. And it is believed the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of congress.

As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs.

The question certified to us is answered, that the defendant, Prescott, and his sureties, are not discharged from the bond, by a felonious stealing of the money, without any fault or negligence on the part of the depositary; and consequently, that no such defence to the bond can be made.

INHABITANTS OF CUMBERLAND COUNTY v. PENNELL.

(Supreme Judicial Court of Maine, 1879. 69 Me. 357, 31 Am. Rep. 284.)

VIRGIN, J.[19] Debt on the official bond of Thomas Pennell as treasurer of the county of Cumberland, executed by him as principal with the other defendants as his sureties, and conditioned that he "shall well and faithfully attend to the duties of said office, and perform all things required by said office to be performed, from the

[19] The statement of facts and parts of the opinion are omitted.

first day of January, 1874, to the first day of January, 1875, the term to which he has been elected."

Under the brief statement pleaded, the defendants offered to prove, in substance, that on December 30, 1874, while Pennell was sitting in the treasurer's office, with the door of the safe therein closed and bolted but not locked, he was suddenly and violently beset, overpowered and rendered senseless by robbers, who, thereupon, against his will and without his fault, burglariously opened the safe and feloniously took and carried away therefrom, the sum of money belonging to the county not paid over by him at the close of his official term, and for the recovery of which this action was brought.

The presiding justice ruled that, assuming the robbery proved as offered, it would constitute no defense. The main question for decision involves the correctness of that ruling. * * *

As already intimated, the responsibility of the county treasurer, in the absence of any statute enlarging it, is measured by the common law rule applicable to bailees for hire other than common carriers and innholders. He is bound, virtute officii, to exercise good faith and reasonable skill and diligence in the discharge of his trust; or, in other words, to bring to its discharge that prudence, caution and attention which careful men usually exercise in the management of their own affairs; and he is not responsible for any loss occurring without any fault on his part. That this substantially is the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private—such as officers of courts having the custody of the property of suitors therein; trustees, except when they mix the trust property with their own, whereby the identity of the former is lost; marshals, appointed by courts of admiralty to take care of vessels and cargoes; receivers, etc., etc.—is amply illustrated by the numerous authorities cited by Bradley, J., in U. S. v. Thomas, 15 Wall. 337, 343, 344, 21 L. Ed. 89. See also 1 Perry on Trusts, § 441, and notes. * * *

In 1845, United States v. Prescott, 3 How. 578, 11 L. Ed. 734, it was decided in substance that, while a receiver or other depositary of the public funds is a bailee, he is a special bailee; made such by his bond which constituted him an insurer; and that public policy required the party to be held absolutely. This case was followed, with more or less consistency, by numerous cases, in various jurisdictions, in which the question was directly or indirectly involved; among them the following: * * *

Notwithstanding the high character of the several courts whose decisions are above cited, we cannot yield our convictions as to the construction to be given to the bond in such case, or concur in relation to the new-born public policy, based upon supposed facility or temptation, which depositaries of the public money are said to possess, for collusive robberies. "For," as was said by Redfield, J., in Bridges v. Perry, 14 Vt. 262, "we cannot believe that they are founded upon any

just warrant, either of sound judgment or constant experience. * * *"

After the promulgation of the contrary doctrine, it was deemed so unjust, harsh and oppressive that congress enacted a statute (Act May 9, 1866, c. 75, 14 Stat. 44) authorizing the court of claims to hear and determine the claims of a disbursing officer for relief; and, in case the loss be found to be without fault or negligence on the part of such officer, to make a decree setting forth the amount thereof, which shall be allowed as a credit by the accounting officers of the treasury in the settlement of his accounts,—thus practically overruling the decisions not allowing losses thus occurring to be set up in defence. * * *

Our conclusion therefore is, that the treasurer's degree of responsibility was simply that which the common law imposed upon him as bailee for hire; that the statute of this state did not extend or enlarge it; that his official bond does not increase his responsibility, but simply affords security for the performance of his legal obligations; that if, without fault or negligence on his part, the county treasurer is violently robbed of money belonging to the county, it is a valid defense, pro tanto, to an action upon his official bond; that the burden of proving such a defense is upon the defendants; * * *

BAILMENTS FOR THE MUTUAL BENEFIT OF THE BAILOR AND BAILEE—PLEDGE

I. Definition and Distinctions [1]

FIRST NAT. BANK OF PARKERSBURG v. HARKNESS et al.

(Supreme Court of Appeals of West Virginia, 1896. 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408.)

ENGLISH, J.[2] * * * The controversy in this case is in regard to the oil in an iron oil tank described as being of the capacity of about 3,000 barrels, amounting to about 1,800 barrels of crude oil in said tank, described in the levy indorsed on said order of attachment. The defendant in error claims said property by virtue of the levy of said attachment thereon, while the plaintiff in error, as administrator de bonis non with the will annexed of Samuel Simes, claims it as having been pledged by William W. Harkness to Peter C. Hollis and Joseph L. Richards, trustees of the estate of Samuel Simes, deceased, to secure the payment of $7,500. It appears from the agreement of facts which is made part of the record that prior to the year 1886 the defendant, William W. Harkness, became the owner of about 1,800 barrels of crude petroleum oil, which he caused to be stored in an iron tank situate on a lot on Depot street in the city of Parkersburg, Wood county, W. Va., which lot and oil tank then belonged to said Harkness, and have ever since belonged to him. After said Harkness had caused said oil to be stored in said tank, he employed a watchman to guard said oil tank, who lived in a house on the lot where the oil tank stands in which the oil was stored. About the year 1886, one C. S. Fewsmith came to Parkersburg to reside, and was employed by said Harkness as agent to have a general oversight over the property of said Harkness, and said tank and the oil stored therein, for the purpose of preserving and protecting the same, which said Fewsmith did as the agent of said Harkness from the year 1886 until the 23d day of May, 1888, when he accepted an order from said William W. Harkness, which reads as follows: "Philadelphia, Pa., May 22, 1888. Mr. C. S. Fewsmith, Parkersburg, W. Va.: Will please hold to the order of Peter C. Hollis and J. L. Richards, trustees of the estate of Samuel Simes, deceased, my stock of lubricating oil stored in my oil tank in Parkersburg, W. Va., as collateral security for the return of $7,500, borrowed and received of them, and oblige, truly [Signed] Wm. W. Harkness,"—which order was accepted by said C. S. Fewsmith in the following

[1] For discussion of principles, see Doble, Bailm. & Carr. § 70.

[2] Part of this opinion is omitted.

words: "Accepted. Parkersburg, W. Va., May 23rd, 1888. [Signed] Crowell S. Fewsmith."

What was the legal effect of this order and acceptance? We can regard it in no other light than that of a pledge of the oil in this tank as collateral security for the payment of the sum of $7,500, mentioned in said order, to said trustees of the estate of Samuel Simes, deceased. Jones, in his valuable work on Pledges (section 1), says: "A pledge may be defined to be a deposit of personal property as security, with an implied power of sale upon default. Lord Holt, who was the first to make a systematic statement of the general law of bailment, defined a pawn to be that sort of bailment 'when goods or chattels are delivered to another to be a security to him for money borrowed of him by the bailor.' Sir William Jones defined it to be 'A bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged.' The definition given it by Judge Story is 'a bailment of personal property as a security for some debt or engagement.'" In order that a pledge of personal property may be effectual, it is necessary that the possession of the property be given to the pledgee. So in the case of Williams v. Gillespie, 30 W. Va. 586, 5 S. E. 210, fourth point of syllabus, this court held that an agreement to pledge personal property for the security of a debt is ineffectual to create a pledge of or lien on the property, unless the property is put in the possession of the pledgee.

Now, in order to determine whether that was done in this instance, we must first consider the character of the property. The tank is an immense iron tub sitting on top of the ground, in this instance having the capacity of 3,000 barrels, and containing 1,800 barrels of crude petroleum. This tank was and is located upon a lot belonging to said William W. Harkness, in the city of Parkersburg. At the time said order was given, said tank and oil were in the possession of C. S. Fewsmith as the agent of said W. W. Harkness, and by him had been given special control and supervision of this tank and the oil it contained. The tank was so immense, and the quantity of oil it contained so great, that actual possession could not be delivered to said trustees; but when we look at the face of the order it is perceived that said William W. Harkness thereby requests his agent, C. S. Fewsmith, to hold, subject to the order of Peter C. Hollis and Joseph L. Richards, trustees of the estate of Samuel Simes, deceased, his stock of lubricating oil stored in his iron tank in his yard at Parkersburg, W. Va., as collateral security for the return of $7,500 borrowed and received of them. By this order he requests C. S. Fewsmith to become the agent of said trustees in holding the possession and caring for said property, and C. S. Fewsmith, by accepting said order, thereby agreed to become the agent of said trustees, and hold the property, as requested, for them. Can we regard this transaction, taken as a whole, in any other light than that of a pledge? Previous to this order, the possession of this 1,800 barrels of oil was held by C. S. Fewsmith as the agent

of William W. Harkness, and by the order or request and its acceptance was transferred to said Fewsmith, as the agent of the trustees of Samuel Simes, deceased, and as security for said sum of $7,500.

Jones, Pledges, § 1, says: "Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge. In Georgia a pledge or pawn is declared to be property deposited with another as security for the payment of a debt." And that, as it seems to us, was done in this case. It appears in the agreed statement of facts that subsequent to this transfer said W. W. Harkness paid the taxes and insurance on this oil, but such payments were not inconsistent with the fact that the property had been pledged for the payment of the $7,500 he had borrowed from the estate of Samuel Simes. He had not sold the property to any person, but had merely pledged it, and it was incumbent on him to pay the taxes to prevent a sale of the property, and it was consistent with prudence that he should insure the property in order to prevent loss to himself, and to avoid the destruction of the security to the Simes estate for the money he had borrowed. The distinction between a pledge and a mortgage is stated in Jones, Chat. Mortg. § 4, as follows: "The chief distinction between a mortgage and a pledge is that by a mortgage the general title is transferred to the mortgagee, subject to be revested by the performance of the condition; while by a pledge the pledgor retains the general title in himself, and parts with the possession for a special purpose." And the same author in his work on Pledges (section 7) says: "A pledge differs from a mortgage of personal property in being a lien upon property, and not a legal title to it. The legal title to the property pledged remains in the pledgor, while a mortgage passes the legal title of the property itself to the mortgagee, subject to be revested in the mortgagor upon the performance by him of an express condition subsequent." The legal title to the property did not pass in this instance; the possession, however, went from Fewsmith, agent of Harkness, to Fewsmith, agent of the trustees of Samuel Simes' estate.

As to the manner in which possession may be held by the pledgee, Jones on Pledges (section 4) says: "But possession may be held by a third person for the pledgee, when such person will be considered as the pledgee's agent." So in the case of Brown v. Warren, 43 N. H. 430, it was held that, "where property is pledged as security for a debt or liability, it is immaterial whether the pledgee holds the property or a third person holds the property for him." "If property of A. be held by B. and C. jointly, A. may assign the same in pledge to B. or C. severally, and the pledge will be good if both B. and C. have knowledge of the same, and assent to hold the property for the pledgee."

It is claimed by counsel for the defendant in error that there was no possession accompanying the pledge, and for that reason it was inoperative. The question is as to the possession of the property at the time the pledge is claimed to have been made. It appears that after

said C. S. Fewsmith came to Parkersburg, in 1886, he was employed by said Harkness as agent to have a general oversight in and over the property of said Harkness and said oil and said tank for the purpose of preserving and protecting the same, which said Fewsmith did, as agent of said Harkness, up to the 23d day of May, 1888, when he accepted said order. Said oil, on account of its character, was not susceptible of being transferred from hand to hand, and all possession that could be taken was a general supervision and control, guarding it from danger of fire, paying taxes and insurance, which Fewsmith was doing at the time of the acceptance of said order.

Upon this question of delivery of possession, Jones on Pledges (section 36) says: "A symbolical delivery is sufficient wherever such a delivery would be sufficient in case of a sale of the same property. Such a delivery may be made of all property incapable of manual delivery. Thus logs in a boom may be effectually pledged by going in sight of them, and pointing them out to the pledgee." Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74; Nevan v. Roup, 8 Iowa, 207; Whitney v. Tibbits, 17 Wis. 359. In the case of Nevan v. Roup it is held that "delivery and possession is essential to a pledge, but the delivery may be symbolical, and the possession according to the nature of the thing." In the case of Whitney v. Tibbits, supra, it was held that: "Where the question was whether, on a pledge of flour stored in a warehouse in Milwaukee, a delivery by the pledgor of the warehouse receipt without indorsement constituted a sufficient delivery of the property to sustain the pledge as against subsequent attaching creditors of the pledgor, and it appeared that said receipt did not run to bearer, but stated that the flour was 'deliverable only on return of the receipt,' etc., held, that the plaintiff was entitled to show that by a general custom in Milwaukee flour in store was transferred by a delivery of such receipts without indorsement."

In the case we are considering, however, there was an acceptance of the order by Fewsmith in accordance with the terms of the order, and Jones on Pledges (section 37) says: "A delivery of a document of title which serves to put the pledgee in possession is equivalent to an actual delivery of them." In section 229 the same author says: "The delivery of a bill of lading is a symbolical delivery of the property represented by it. The person who takes a bill of lading for a valuable consideration, whether this arises at the time or rests upon a previously existing debt, has the right to the property without taking actual possession of it, or doing any further act to perfect this title." See Neill v. Produce Co., 41 W. Va. 37, 23 S. E. 702. So it is said: "Warehouse receipts, by custom, have long been considered as representing the property mentioned in them; and the assignment or indorsement of such instruments has long been regarded as equivalent to the delivery of such property." See Jones, Pledges, § 280.

As we regard this transaction, the possession of Fewsmith before said written order was drawn on him and accepted was the possession

of Harkness; by such acceptance, he agreed to become the agent of said trustees in holding the possession of the oil and controlling the same, and did so become; and in this manner the possession was transferred from Harkness to said trustees, Harkness holding the possession by his agent "facit per alium facit per se," transferred to Fewsmith as the agent of these trustees, and they held it, as did Harkness, through their agent. "Though a pledge be evidenced by a writing, it need not be recorded if the writing constitute a pledge, and not a mortgage." Jones, Pledges, § 6.

The case under consideration by its record presents a contest between the defendant in error, the First National Bank, claiming the oil stored in this tank under an attachment levied thereon subsequent to the date of said written request signed by W. W. Harkness, and directed to said C. S. Fewsmith, and accepted by him; and the question is, what right to said oil remained in W. W. Harkness at the time said attachment was levied, after pledging said property to the trustees of Samuel Simes, deceased? What right could said W. W. Harkness assert in any court to repossess himself of said 1,800 barrels of oil without paying said sum of $7,500, for which it was pledged? He certainly could maintain no such claim successfully, and the question is, if said Harkness had no right to said oil superior to said pledgee's, could the defendant in error, under its attachment lien, have or take more than Harkness had at the time of the levy?

We find the law upon this question stated by Shinn, Attachm. p. 611, § 318, who thus states the law: "A creditor cannot, by attachment, acquire any higher or better right in the property attached than the debtor himself had at the time of the levy of the attachment, unless he can show that there has been fraud or collusion to his detriment." The lien obtained by attachment is subject to all previous liens by bona fide creditors; therefore the effect of the attachment is to subject only the interest which the defendant has in the property at the time of its seizure, and, having reached the conclusion that the oil in said tank was pledged to the payment of said sum of $7,500, with its accrued interest, we hold that said attachment is subject to said pledge, and can only be satisfied out of the surplus remaining from the sale of said oil after the satisfaction of the said sum of $7,500, with its accrued interest; and the judgment of the court below dismissing the petition filed by the plaintiff in error is reversed, the judgment is reversed so far as it gives said attachment lien priority over said pledge as to the oil levied on thereunder, and the case is remanded, with costs to the plaintiff in error.

II. Delivery [3]

AMERICAN CAN CO. et al. v. ERIE PRESERVING CO. et al. SAME v. NEW YORK COUNTY NAT. BANK et al. SAME v. TIMERMAN et al.

(Circuit Court of Appeals of United States, Second Circuit, 1910. 183 Fed. 96, 105 C. C. A. 388.)

Appeals from the Circuit Court of the United States for the Western District of New York.

Suit in equity by the American Can Company and Paul Voorhees against the Erie Preserving Company. From orders (171 Fed. 540) denying the petitions of Ladenburg, Thalmann & Co., Conrad Heinrich Donner, the New York County National Bank, and Arbuthnot, Latham & Co., they appeal; and from an order (171 Fed. 548) allowing the petition of the Bank of North Collins, Clark H. Timerman and William E. Peugeot, receivers, appeal.

WARD, Circuit Judge. The Erie Preserving Company was engaged in the business of canning vegetables and fruit in factories at Irving, North Collins, and Model City, N. Y. The American Warehousing Company was engaged in what is known as "field storage warehousing"; that is, warehousing the owner's goods on the premises of the owner or of the former owner. This system is frequently practiced and is entirely effective when properly carried on. Phila. Co. v. Winchester (C. C.) 156 Fed. 600.

In August, 1907, the preserving company entered into an agreement with the warehousing company for the purpose of obtaining warehouse receipts for goods stored on its own premises; the receipts to be used as collateral for loans. To that end it leased all its premises to the warehousing company, and the warehousing company appointed one Wode, who was the preserving company's superintendent, to act as its own custodian of the warehoused goods. Various other agreements not necessary to mention were entered into to carry out the arrangement.

The course of dealing was that, upon requisitions of Wode, the warehousing company issued warehouse receipts for property actually on the premises to the order of the preserving company, which it indorsed and used as collateral. Receipts of this kind were held by the New York County National Bank, dated in June, 1908, and Arbuthnot, Latham & Co., dated from September, 1907, to March, 1908.

Other receipts similar in form were issued by Edward J. Sheridan, an employé of the preserving company, as a warehouseman, and used

[3] For discussion of principles, see Dobie, Bailm. & Carr. § 74. Besides the cases under this heading, see, also, First Nat. Bank v. Harkness, ante, p. 109.

in the same way. Such receipts were held by Ladenburg, Thalmann & Co., dated in March, 1908, and by Conrad Heinrich Donner, dated in February, 1908, both of whom supposed that Sheridan was an independent warehouseman.

Other similar receipts were issued by Wode as a warehouseman and used in the same way. Such receipts were held by the Bank of North Collins, dated January, February, and March, 1908. It knew that Wode was the superintendent of the preserving company, but appointed him as its own custodian of the goods mentioned in the receipt.

March 7, 1908, receivers of the preserving company were appointed in this suit by a stockholder and a general creditor, alleging that it was not able to meet its obligations in due course and praying that it be wound up and its assets distributed among its creditors. The defendant company in its answer admitted the allegations of the bill.

The goods mentioned in the receipts of the Bank of North Collins and goods in kind and amount of those mentioned in the other receipts were sold without prejudice to the rights of any one, and the holders of the receipts claim the proceeds or an equitable lien on the same.

Only one lease is in evidence, viz., that to the warehousing company for all the preserving company's premises. Sheridan testified that he had a "little lease" which was called for but not produced. Of course there could not be two leases of the same premises to different persons at the same time, and at the date of Sheridan's receipts the premises were leased to the warehousing company, which had a custodian there. Wode did not pretend to have any lease.

The business of the preserving company after the lease of its premises to the warehousing company went on in exactly the same way as before. Goods covered by the receipts, except in the case of the Bank of North Collins, were sold and other goods substituted. The use and occupation of all the premises by the preserving company was open, continuous, and exclusive. Care was taken by the warehousing company and by Sheridan that there should always be more goods of the same kind on the premises than were called for by the warehouse receipts, but none of the goods called for by the receipts were segregated or marked so as to be distinguished from the general stock of the preserving company, except in the case of the Bank of North Collins.

All the loans were made in entire good faith on the strength of the receipts and of the goods called for by them, and the preserving company intended to give a valid lien thereon. The receipts were assigned to the lenders for the purpose of pledging the goods, and we think the case turns on the question: Had the lenders valid pledges? A pledgee, though he may sell the pledge if the debt is not paid, has only a lien upon and no title to it. The common law does not recognize a lien unaccompanied by possession either actual or constructive. This does not depend in any way upon fraud, actual or presumptive. We there-

fore need not examine the statutes or the law as to sales unaccompanied by delivery. We are not concerned with the questions whether such sales are void as absolutely fraudulent, or only voidable as presumptively fraudulent, or whether all creditors may attack them or only creditors existing when the sales were made. The law as to pledges is clear, viz., that they are utterly invalid unless accompanied by actual or constructive possession. The subject is elaborately considered by Mr. Justice Bradley in Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779.

The judge of the Circuit Court rightly held that the receipts were invalid because the goods were not warehoused, and that there was no valid pledge because no delivery was made to the lenders except in the case of the Bank of North Collins.

Warehouse receipts would give constructive possession of goods actually warehoused; but it is plain that the warehousing company did not maintain a warehouse in any proper sense, because it had no exclusive and unequivocal possession. There is no pretense that either Sheridan or Wode were warehousemen at all. Yenni v. McNamee, 45 N. Y. 614. Therefore the holders of these receipts who had no actual possession had no constructive possession either. The Bank of North Collins has, however, been found both by the special master and the judge of the Circuit Court to have actually set apart and marked and kept in its own custody the goods described in its receipts, which remained undisturbed down to the time receivers were appointed. We will adopt the conclusion of the court below as to its claim also, because it did have actual possession and a valid lien.

It is contended by the holders of the receipts of the warehousing company and of Sheridan that they have an equitable lien. Equity would have compelled the preserving company to make actual delivery of the goods intended to be pledged, and it is said that the receivers standing in the place of the preserving company are subject to the same rule. But, though equity will treat that which ought to have been done as done between the parties, it will not do so to the prejudice of third parties. If the essential element of possession of property in existence was wanting to make the pledges good when receivers were appointed, equity would not thereafter supply it to the detriment of general creditors.

All the orders are affirmed, with costs.

CORNICK v. RICHARDS.

(Supreme Court of Tennessee, 1879. 3 Lea, 1.)

FREEMAN, J.[4] The contest in this case is over the question of the right of priority on the part of various creditors of Richards, who was a stockholder in the Knoxville Iron Company, as to shares of stock attached to satisfy debts due by said Richards. * * *

In a portion of the cases, Richards had obtained money from parties, and had deposited or handed over certificates of stock to such parties as collateral security, with a power of attorney authorizing a transfer of the stock and sale in case he failed to pay at maturity. In the case of the note held by Cornick, this agreement as to the stock being the collateral, is in the face of the note, and a separate power of attorney in blank is given on the back of the certificate expressing the fact of sale and transfer of the shares of stock, the blank for the party to whom sold being properly filled up to Cornick in accordance with the clear intention of the parties. * * *

We now proceed to the discussion of the main question presented in the case, How can shares of stock owned by an individual be assigned or transferred, and under what circumstances is the transfer complete, so as to preclude creditors of an owner who attempts to assign or does hand over the certificate for shares of stock as collateral security for a debt, from fixing a lien upon the stock, or appropriating it by legal process to their debt? * * *

There being no legislative regulation as to the mode of transferring title to stock in a corporation now, either by general law or in the charter in this case, we have the question to be solved on general principles of law based on sound reason and public policy. The right to dispose and transfer the title being a recognized and universal incident to ownership of property, the exercise of that right should not be trammeled by any restrictions except such as grow out of the nature of the property or the demand of a sound public policy. It is urged that from the nature of this property in stocks, and its concomitants such as being an interest issuing out of a corporation having officers and keeping books showing the issuance of its stock, which books are required to be kept in the manner we have seen by section 1491 [Code 1858], that the existence of the stock or its ownership originally being shown on these books that it ought not to be permitted to be transferred except by entries on such books. We need but say here that we can see no need for this requirement as between the parties contracting for a transfer. The books are not public records in any proper sense of our law. Why one private individual should be required to effectuate the sale of the property of another in which he has no title or interest as property by entering the fact in his books, it is not easy to see, not even if the fact be that the party selling had originally purchased the prop-

[4] Parts of the opinion are omitted.

erty from him. Yet this fairly represents the fact in the case of stock in a corporation. * * *

In adopting a rule as to the transfer of this peculiar kind of property, we should look to the nature of the property, the uses to which it is put in the transaction of the business of the country, and at the same time not be unmindful of the established habits of dealings with the same among business men. This last should have an influence in this question of full weight, because we may be assured that what has been universally agreed on and established as the custom of such merchants, is the result of a felt need that has been met by the keenest practical sagacity dealing with the question.

It is true our state is comparatively an agricultural one, but still in our business centers this species of property is as much used in the transactions of the market as in any other state, in proportion to the amount of such property held by our citizens. In addition, we must not forget that we are laying down a rule not alone for to-day, but for the future, with all its development of our resources, agricultural, mining and manufacturing, and this development must inevitably bring an immense commerce in the handling of its products.

We know, as a matter of well accredited current history, that stocks are used every day in the transactions of our business men as collaterals, as well as sold, and that the universal practice is to transfer or assign the certificate of the stock with a power of attorney in blank to be filled up, authorizing a transfer by the corporation on its books to the purchaser on the presentation of which power, properly authenticated, the corporation transfers the stock to the purchaser, or holder; and when the sale is absolute, it is usual to issue new certificates to the party, taking up the old. Such a practice facilitates the easy use of this property in commercial transactions. The requirement that the title could alone be transferred on the books of the corporation, or by notice to the corporation, would greatly tend to trammel this use, and, as far as we can see, notice to the corporation can serve no practical end, and has no appropriate place in the transaction, so far as passing the title from a holder to a purchaser, or the right of a creditor as to a purchaser, for he can, as he will always do, protect himself by requiring an assignment of the certificate, and then a transfer on the books of the corporation. The rule requiring transfer on the books of the corporation can only serve to give a creditor who has a judgment or attachment a legal advantage who has never given credit on the faith of the stocks, over the other who has advanced his money on them and taken the evidence of his security by a transfer of the certificate. In such cases alone will the contest be likely to arise, as the party who intends to trust to the security of such property will always take the assignment. In such a contest the equities are altogether in favor of the assignee who has advanced his money on the faith of the collaterals. * * *

We only hold that the title passes and is completely transferred, whether in case of collaterals or an absolute sale, so that a creditor who has fixed no liens on it before cannot appropriate it to his debt and override the title of the purchaser who has, in good faith, obtained a regular assignment of the certificate of stock under a valid contract between himself and the owner. * * *

III. Relative Title Acquired by the Pledgee[5]

RAILROAD CO. v. NATIONAL BANK.

(Supreme Court of United States, 1880. 102 U. S. 14, 26 L. Ed. 61.)

HARLAN, J.[6] * * * This question was carefully considered, though, perhaps, it was not absolutely necessary to be determined, in Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865. After stating that the law respecting negotiable instruments was not the law of a single country only, but of the commercial world, the court, speaking by Mr. Justice Story, said: "And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of *or as security for a pre-existing debt* is according to the known usual course of trade and business. And why, upon principle," continued the court, "should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor, also, has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in pay-

[5] For discussion of principles, see Doble, Bailm. & Carr. § 78.

[6] The statement of facts and parts of the opinion have been omitted.

ment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts."

After a review of the English cases, the court proceeded: "They directly establish that a bona fide holder, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties." * * *

According to the very general concurrence of judicial authority in this country as well as elsewhere, it may be regarded as settled in commercial jurisprudence—there being no statutory regulations to the contrary—that where negotiable paper is received in payment of an antecedent debt; or where it is transferred, by indorsement, as collateral security for a debt created, or a purchase made, at the time of transfer; or the transfer is to secure a debt, not due, under an agreement express or to be clearly implied from the circumstances, that the collection of the principal debt is to be postponed or delayed until the collateral matured; or where time is agreed to be given and is actually given upon a debt overdue, in consideration of the transfer of negotiable paper as collateral security therefor; or where the transferred note takes the place of other paper previously pledged as collateral security for a debt, either at the time such debt was contracted or before it became due,—in each of these cases the holder who takes the transferred paper, before its maturity, and without notice, actual or otherwise, of any defence thereto, is held to have received it in due course of business, and, in the sense of the commercial law, becomes a holder for value, entitled to enforce payment, without regard to any equity or defence which exists between prior parties to such paper.

Upon these propositions there seems at this day to be no substantial conflict of authority. But there is such conflict where the note is transferred as collateral security merely, without other circumstances, for a debt previously created. One of the grounds upon which some courts of high authority refuse, in such cases, to apply the rule announced in Swift v. Tyson is, that transactions of that kind are not in the usual and ordinary course of commercial

dealings. But this objection is not sustained by the recognized usages of the commercial world, nor, as we think, by sound reason. The transfer of negotiable paper as security for antecedent debts constitutes a material and an increasing portion of the commerce of the country. Such transactions have become very common in financial circles. They have grown out of the necessities of business, and, in these days of great commercial activity, they contribute largely to the benefit and convenience both of debtors and creditors. Mr. Parsons, in his treatise on the Law of Promissory Notes and Bills of Exchange, discusses the general question of the transfer of negotiable paper under three aspects,—one, where the paper is received as collateral security for antecedent debts. We concur with the author, "that, when the principles of the law merchant have established more firmly and unreservedly their control and their protection over the instruments of the merchant, all of these transfers (not affected by peculiar circumstances) will be held to be regular and to rest upon a valid consideration." 1 Parsons, Notes and Bills (2d Ed.) 218.

Another ground upon which some courts have declined to sanction the rule announced in Swift v. Tyson is, that upon the transfer of negotiable paper merely as collateral security for an antecedent debt nothing is surrendered by the indorsee,—that to permit the equities between prior parties to prevail deprives him of no right or advantage enjoyed at the time of transfer, imposes upon him no additional burdens, and subjects him to no additional inconveniences.

This may be true in some, but it is not true in most cases, nor, in our opinion, is it ever true when the note, upon its delivery to the transferee, is in such form as to make him a party to the instrument, and impose upon him the duties which, according to the commercial law, must be discharged by the holder of negotiable paper in order to fix liability upon the indorser.

The bank did not take the note in suit as a mere agent to receive the amount due when it suited the convenience of the debtor to make payment. It received the note under an obligation imposed by the commercial law, to present it for payment, and give notice of non-payment, in the mode prescribed by the settled rules of that law. We are of opinion that the undertaking of the bank to fix the liability of prior parties, by due presentation for payment and due notice in case of non-payment,—an undertaking necessarily implied by becoming a party to the instrument,—was a sufficient consideration to protect it against equities existing between the other parties, of which it had no notice. It assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position. * * *

NEILL et al. v. ROGERS BROS. PRODUCE CO. (FIRST NAT. BANK OF SANTA BARBARA, Intervener).

(Supreme Court of Appeals of West Virginia, 1895. 41 W. Va. 37, 23 S. E. 702.)

Action by Neill & Ellingham against Rogers Bros. Produce Company for breach of contract, wherein an attachment issued. The First National Bank of Santa Barbara intervened, claiming the property attached. There was a judgment for plaintiffs, and intervener brings error.

ENGLISH, J.[1] Rogers Bros. Produce Company, a corporation of the city of Santa Barbara, Cal., consigned to the firm of Neill & Ellingham, of the city of Wheeling, W. Va., 206 bags of prunes, and drew a sight draft on said Neill & Ellingham, payable to the First National Bank of Santa Barbara, for $1,776.22, dated September 15, 1890, and delivered said draft, together with the bill of lading received by them from the Atlantic & Pacific Railroad Company, properly indorsed by them, to said bank. Said draft was indorsed to the Chemical National Bank of New York by the cashier of the First National Bank of Santa Barbara, and from said Chemical National Bank, with said bill of lading, was sent to the National Bank of West Virginia, at Wheeling, for collection, and, when presented, payment of the same was refused. On the 3d day of October, 1890, the said firm of Neill & Ellingham caused an attachment for the sum of $3,534.44 to be levied upon said prunes, which at the time of said levy were in the possession of the Baltimore & Ohio Railroad Company. On the 20th day of November, 1890, the First National Bank of Santa Barbara filed its petition, alleging that under said attachment 206 bags of prunes had been levied on and taken from the possession of the Baltimore & Ohio Railroad Company, and were then held by the sheriff of said county of Ohio, and that petitioner had such a claim to and interest in said property as entitled it to have the same released from such levy; that on the 15th day of September, 1890, in consideration of the sum of $1,776.22 then paid by petitioner to the above-named Rogers Bros. Produce Company, said produce company made and delivered to petitioner its bill of exchange or draft for said sum, drawn upon said Neill & Ellingham, payable at sight to the order of petitioner, and at the same time indorsed and delivered to petitioner a bill of lading for said property, issued by the Atlantic & Pacific Railroad Company in favor of the order of said Rogers Bros. Produce Company; that petitioner became, on said 15th day of September, 1890, and before the levying of said attachment, and ever since said date has been and then was, the owner in good faith and for a valuable consideration of said property and of said bill of exchange and bill

[1] Parts of the opinion are omitted.

of lading, and was entitled to the possession of said property; and petitioner prayed that such orders might be made as might be necessary to protect its rights. The questions raised by this petition were, on the 1st day of May, 1891, submitted to a jury, and resulted in a verdict finding for Neill & Ellingham. * * *

The court gave, at the instance of the plaintiffs, six instructions to the jury: * * * "(5) The jury are instructed that the pledge of personal property, as by the transfer of a bill of lading as collateral security, does not pass to the pledgee the title to the said personal property, but merely creates a lien, the property remaining the property of the pledgor, subject to such lien; and that another creditor of the pledgor may attach such property as the property of the pledgor, subject to any valid rights acquired by the pledgee by reason of such pledge or transfer." * * *

The question presented in this case is not whether petitioner would have a right to recourse upon the Rogers Bros. Produce Company in the event it fails to recover the amount of said draft out of the proceeds of said prunes, nor as to the manner in which it may recover the amount paid for said draft in that event, but whether the petitioner, by reason of the assignment for value to it of said draft and bill of lading, is entitled to hold the prunes against the claim asserted by the defendants in error under their attachment. * * * Upon this question, Schouler, in his work on Bailments and Carriers, in section 189, states the law thus: "The transfer of a bill of lading of a ship at sea, or the delivery of a warehouse key, have long been esteemed sufficient for legally transferring possession of the thing so symbolized. And so in modern times one's pledge by delivering bills of lading of goods on transit or way bills, whether inland or by water, usually suffices to make the pledgees' title good against the world." And in the next section the author says: "It is quite customary of late years for the consignee of goods which are on transit to pass his bills of lading over to some bank or capitalist by way of security for the discount of his paper. Such transfers are firmly sustained by American courts as amounting to a pledge of the goods themselves for the pledgors' paper indebtedness, and, whether the transit were by land or sea, valid on the score of a constructive delivery as against both the pledgee and the public." The safety and facility which this rule of law affords has produced in good part the wide expansion of modern commerce. See, also, on this point, Holmes v. Bailey, 92 Pa. 57, where it is held that: "Where a bill of lading is attached to a draft as security for its payment, and transferred for a valuable consideration, it is an appropriation of the property contained in the bill, whether it is indorsed or not." See, also, Holmes v. Bank, 87 Pa. 525, where it was held that: "Where a bank discounted a draft with a bill of lading attached as security for its payment, and sent it to a correspondent for collection, the commission firm to

whom the property was consigned refused to pay the draft, and afterwards received and sold the property, and applied the proceeds to an old debt due them by the consignor, held that, having notice of the draft and bill of lading before sale, they were informed of the appropriation of the proceeds of sale, and could not apply them to an old debt of their own." This question was also before the supreme court of Massachusetts in the case of Hathaway v. Haynes. 124 Mass. 311, where it is held that: "Where a draft is drawn by the shipper of goods on a third party, and a bill of lading in which the shipper is named as consignee is indorsed in blank by him, and attached to the draft, and delivered to a bank discounting the draft as collateral security for the money advanced, such delivery transfers a special property in the goods to the bank; and if the goods come wrongfully into the possession of a person, who sells them, and is summoned as trustee of the shipper in an action by another creditor, the bank may appear as adverse claimant, and has a better title to the proceeds of the goods than the attaching creditor." See, also, Conard v. Insurance Co., 1 Pet. 445, 7 L. Ed. 189.

These cases appear to me to state correctly the law bearing upon the question as to the effect of the transfer of the bill of lading in the circumstances of the case under consideration. * * * The judgment complained of is therefore reversed, and the case remanded, with costs. * * *

IV. Profits of the Thing Pledged[8]

BOYD v. CONSHOHOCKEN WORSTED MILLS.

(Supreme Court of Pennsylvania, 1892. 149 Pa. 363, 24 Atl. 287.)

Action by Augustus Boyd against the Conshohocken Worsted Mills. From a judgment for plaintiff, defendant appeals.

McCOLLUM, J.[9] * * * It appears that on the 1st of July, 1882, Boyd was the owner of 300 shares of the stock of the appellant company, and Bullock was indebted to him in the sum of $10,000. On that day Boyd sold and transferred his stock to Bullock for $30,000, and received Bullock's note for $40,000, at five years, with interest payable quarterly. This note was for the price of the stock and the amount of Bullock's indebtedness to Boyd on other matters. As collateral to the note the stock was transferred by Bullock, to Boyd, and a certificate therefor was issued to him, and

[8] For discussion of principles, see Dobie, Bailm. & Carr. § 81.

[9] Parts of the opinion are omitted.

duly registered, so that from that time to the present Boyd has appeared on the books of the company as the owner of the stock. From the dividends declared by the company after this transaction, and before the maturity of the note, the sum of $5,700 belonged to the stock so held by him, but was paid by the company to Bullock, without any authority from the legal holder of the stock to make such payment, or notice to him that a dividend had been declared. The uncontradicted testimony of Boyd is that he repeatedly spoke to Bullock on the subject of the dividends, and was always assured by him that the company had not declared any, but that it was accumulating a fund as a working capital. It appears now that a dividend of 5 per cent. was declared by the company on the 11th of November, 1884, one of 6 per cent. on the 10th of November, 1885, and one of 8 per cent. on the 9th of November, 1886, and that these were all paid to Bullock at the time or soon after they were declared.

It is conceded that the dividends belonged to Boyd, and that, in an action by him against the company to recover them at any time prior to June 29, 1887, the unauthorized payments to Bullock would not have been available as a defense. But it is claimed that by a transaction with Bullock on that day he relinquished his right to the dividends. What was that transaction? A reduction of the debt to $22,000 by payment on account of it, a retention of the collateral security for it, a surrender of the old note, and an acceptance of a renewal note on one year's time for the balance of it. It is true that the new note conferred on the creditor additional power over the collateral, but this was in aid of the creditor in the conversion of the security, and did not in any sense impair it. It is clear from the testimony of Boyd that he did not understand that the transaction involved a surrender by him of $5,700 of the collateral security which he then held, and the only conclusion consistent with a belief in his veracity and Bullock's integrity is that it was the mutual intention of the parties that Boyd should retain all the security then had by virtue of the pledge of the stock in July, 1882. * * * The appellant company, with full knowledge that the dividends belonged to Boyd, who appeared on its books as the owner of the stock, and who, it is now admitted, was entitled to receive them, deliberately paid them to Bullock, without the consent of or notice to the owner, and, while conceding the mispayment, seeks to evade its own just liability by setting up an alleged equity in Bullock's estate, arising from subsequent transactions between the pledgor and pledgee. It is a defense founded upon an unauthorized act to which the company and Bullock were parties, and which was unknown to Boyd at the time of the transaction in which it is claimed he surrendered, without knowing it, $5,700 of his collateral security. If it is technically admissible in this action,

it is clear from the undisputed evidence that there is no substantial merit in it.

A separate consideration of the second reversal is unnecessary, because the condition existing after the first one was not changed by it. The instructions to the jury were unobjectionable, and the remaining specifications of error are overruled. Judgment affirmed.

V. Conversion of the Pledged Goods—Damages [10]

GALIGHER v. JONES.

(Supreme Court of United States, 1889. 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658.)

BRADLEY, J.[11] * * * As to the second item of counterclaim set up in the answer, namely, the alleged wrongful sale by the plaintiff of 600 shares of "Challenge" stock, the referee found that the plaintiff held such stock for the defendant, and on the 27th and 29th of November, 1878, of his own motion, and without notice to the defendant, sold it for $1.25 per share; that in December the stock sold as high as $2 per share; in January the highest price was $3.10; in February, the highest price was $5.50. The referee allowed the defendant the highest price in January, namely, $3.10 per share, being an advance of $1.85 above what the plaintiff sold the stock for, which, for the whole 600 shares, amounted to $1110. The reason assigned by the referee for not allowing the defendant the highest price in February, (namely, $5.50 per share,) was that before that time the defendant had reasonable time, after receiving notice of the sale of his stock by the plaintiff, to replace it by the purchase of new stock, if he desired so to do; and he allowed him the highest price which the stock reached within that reasonable time. In this conclusion we think the referee was correct, and as to this item we see no error in the result. * * * It has been assumed, in the consideration of the case, that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time

[10] For discussion of principles, see Doble, Bailm. & Carr. § 84.

[11] Parts of the opinion are omitted.

of conversion would, in most cases, afford a very inadequate remedy, and, in the case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence, with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust.

The rule of highest intermediate value as applied to stock transactions had been adopted in England and in several of the States in this country; whilst in some others it has not obtained. The form and extent of the rule have been the subject of much discussion and conflict of opinion. The cases will be found collected in Sedgwick on the Measure of Damages, (479,) vol. 2 (7th Ed.) 379, note (b); Bayne on Damages, 83, (92 Law Lib.); 1 Smith's Lead. Cas. (7 Amer. Ed.) 367. The English cases usually referred to are Cud v. Rutter, 1 P. Wms. 572, 4th Ed. (London, 1777) note (3); Owen v. Routh, 14 C. B. 327; Loder v. Kekule, 3 C. B. (N. S.) 128; France v. Gaudet, L. R. 6 Q. B. 199. It is laid down in these cases that where there has been a loan of stock and a breach of the agreement to replace it, the measure of damages will be the value of the stock at its highest price on or before the day of trial.

The same rule was approved by the Supreme Court of Pennsylvania in Bank of Montgomery v. Reese, 26 Pa. (2 Casey) 143, and Musgrave v. Beckendorff, 53 Pa. (3 P. F. Smith) 310. But it has been restricted in that State to cases in which a trust relation exists between the parties,—a relation which would probably be deemed to exist between a stock-broker and his client. See Wilson v. Whitaker, 49 Pa. (13 Wright) 114; Huntingdon R. R. Co. v. English, 86 Pa. 247.

Perhaps more transactions of this kind arise in the State of New York than in all other parts of the country. The rule of highest intermediate value up to the time of trial formerly prevailed in that State, and may be found laid down in Romaine v. Van Allen, 26 N. Y. 309, and Markham v. Jaudon, 41 N. Y. 235, and other cases,—although the rigid application of the rule was deprecated by the New York Superior Court in an able opinion by Judge Duer, in Suydam v. Jenkins, 3 Sandf. (N. Y.) 614. The hardship which arose from estimating the damages by the highest price up to the time of trial, which might be years after the transaction occurred, was often so great, that the Court of Appeals of New York was constrained to introduce a material modification in the form of the

rule, and to hold the true and just measure of damages in these cases to be, the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock. This modification of the rule was very ably enforced in an opinion of the Court of Appeals delivered by Judge Rapallo, in the case of Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507, which was subsequently followed in the same case in 66 N. Y. 518, 23 Am. Rep. 80, and in Gruman v. Smith, 81 N. Y. 25; Colt v. Owens, 90 N. Y. 368; and Wright v. Bank of Metropolis, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356.

It would be a herculean task to review all the various and conflicting opinions that have been delivered on this subject. On the whole it seems to us that the New York rule, as finally settled by the Court of Appeals, has the most reasons in its favor, and we adopt it as a correct view of the law.

VI. Rights and Duties of the Pledgee after Default

1. Holding the Goods Pledged [12]

MINNEAPOLIS & N. ELEVATOR CO. v. BETCHER.

(Supreme Court of Minnesota, 1889. 42 Minn. 210, 44 N. W. 5.)

Mitchell, J. As collateral security for two promissory notes, payable on or before July 1, 1886, the defendant pledged to plaintiff a quantity of wheat, authorizing it to sell the same, with or without notice, either at public or private sale, at its option, on the notes becoming due, or before, if it deemed itself likely to become insecure by keeping the wheat until the notes became due. Default having been made in the payment of the notes, the wheat was sold by the plaintiff in March, 1887, and, not realizing enough to pay the claims in full, this action was brought to recover the deficiency.

The only defense relied on at the trial was that set up in the amended answer, to wit, that on or about May 1, 1886, the defendant ordered the plaintiff to sell the wheat; and this not having been done, it was claimed that the plaintiff was chargeable with the market value of the wheat at that date which, although less than the amount of the notes, would have netted more than in March, 1887. The court charged the jury, in substance, that if the defendant in May, 1886, requested plaintiff to sell the grain, he was entitled to credit for what

[12] For discussion of principles, see Doble, Bailm. & Carr. § 86.

it would have brought at that date. This instruction proceeded upon an entirely erroneous theory as to the rights and duties of pledgor and pledgee. The case is controlled by the familiar rules on that subject stated in Cooper v. Simpson, 41 Minn. 46, 42 N. W. 601, 4 L. R. A. 194, 16 Am. St. Rep. 667. In the absence of an express contract between the pledgor and pledgee, making it the absolute duty of the latter to sell at a specified time, he is not obliged to sell even when requested so to do by the former. The power to sell is a right, and not a duty. The exercise of ordinary care in respect to the thing pledged is the duty which the law imposes on the pledgee, and for the breach of that duty only does he become liable. After the contract of pledging is made, neither party can, by anything he alone may do, vary the duties or powers attaching to the relation. Of course the condition and character of the property might be such that a failure to sell would amount to a want of ordinary care; and it may be, as held in some cases, that a request to sell might be an element in the proof of negligence. But no such questions are presented in this case.

The answer and the charge of the court proceed upon the theory, that, independently of any question of negligence in the care of the property, it is the absolute duty of the pledgee to sell whenever requested by the pledgor. Order reversed.

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2 SUIT ON THE DEBT SECURED [18]

SMITH v. STROUT.

(Supreme Judicial Court of Maine, 1874. 63 Me. 205.)

On exceptions.

Trover to recover the value of four bonds of the Portland & Oxford Central Railroad Company, held by Paddock, one of the defendants, as collateral security for a loan to the plaintiff, still unpaid. After maturity of the note given for this loan, a judgment and execution were obtained upon it, the debtor arrested, and gave the six months' bond authorized by R. S. c. 113. The plaintiff contended that these proceedings were a waiver and discharge of the creditor's claim to hold the collateral security, but the justice of the superior court, to whom the cause was submitted, ruled otherwise.

Mr. Paddock, after the arrest of his debtor, and upon the latter's demand for them, promised to surrender the collateral, but upon the

[18] For discussion of principles, see Doble, Bailm. & Carr. § 87.

advice of his counsel, the other defendants, in whose possession they were, declined to do so. The judge held this refusal was no evidence of a conversion. The plaintiff excepted.

PETERS, J. The plaintiff owed one of the defendants, and gave him certain railroad bonds as collateral to the debt. The defendant afterwards said to the plaintiff that he would surrender the bonds to him, but failed to do so. The principal debt is not yet paid. This is not a waiver of a right to hold the bonds by the creditor. It is, at most, but a promise to waive. Being unexecuted and without consideration, the creditor was not bound by it.

The debtor further contends that the creditor has forfeited his right to the bonds, because, after taking them as security, he sued the original debt and recovered execution, and arrested the body of the debtor thereon. But this point cannot be maintained. The law does not extend a double remedy to a creditor to collect a debt by the use of a capias and an attachment upon the same process. But parties may superadd to the remedy at law, by agreement between themselves, such arrangements for securing the payment of debts as they please. The very essence of a collateral agreement of this kind is, that the security may be resorted to for a satisfaction of the principal debt, if its payment shall not otherwise be obtained. The principle established in a class of cases, like Legg v. Willard, 17 Pick. (Mass.) 140, 28 Am. Dec. 282, relied on by the plaintiff, is not applicable here. There the creditor caused the property, held in pledge by him, to be attached upon a writ sued out upon the very claim for the security of which the property was pledged. The two claims of the creditor in that case were inconsistent. In this case, the continued possession of the bonds by the crelitor was not at all inconsistent with any of the means adopted by him to endeavor to collect his debt.

Exceptions overruled.

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3. SALE OF THE GOODS PLEDGED [14]

MARYLAND FIRE INS. CO. v. DALRYMPLE.

(Court of Appeals of Maryland, 1866. 25 Md. 242, 89 Am. Dec. 779.)

Dalrymple obtained on June 12, 1860, a loan of $19,500 from the Maryland Fire Insurance Company, and Dalrymple deposited with the company, as security for the payment of the loan, 325 shares of stock in the Baltimore & Ohio Railroad Company. Under the agreement of the parties, this loan was to be paid on one day's notice and,

[14] For discussion of principles, see Doble, Bailm. & Carr. § 88.

upon default of such payment, the Insurance Company was authorized *without further notice* to sell the stock for the payment of the debt.

The stock steadily declined in price after the date of the loan, and the Insurance Company on November 13, 1860 (after several other such notices), gave Dalrymple notice "to return the whole of said loan, $19,500, on to-morrow, the 14th inst.," which Dalrymple failed to do. On November 20, 1860, the Insurance Company procured the stock to be sold at the Board of Brokers and the Insurance Company itself became the purchaser of the stock at this sale at $55 per share, then the highest price obtainable. The Insurance Company also demanded payment of the balance due on the debt after deducting the amount realized from the sale of the stock. This stock was held by the Insurance Company until the spring of 1862, when it was sold publicly at the Board of Brokers at from $60 to $67 per share, the net amount realized from this sale being $19,943.75. On April 16, 1861, the Insurance Company received and retained a dividend of $3 per share on the stock.

On December 16, 1862, Dalrymple tendered to the Insurance Company the sum loaned with interest and demanded a return of the stock. The Insurance Company declined the tender and refused to return the stock, saying that it had been sold. Proof was offered to show that at the time of this tender the stock was worth about $78 per share, and at the time of the trial its value was $115 per share, and, further, that at the time of the sale of November 20, 1860, the stock was worth but $55 per share, while subsequent to that sale (April 25, 1861) the stock sold as low as $41.50 per share. Both plaintiff and defendant appealed from the verdict for the plaintiff.

BARTOL, J.[15] This suit was instituted by Wm. T. Dalrymple against the Maryland Fire Insurance Company to recover damages for the alleged illegal sale and conversion, by the defendant, of 325 shares of the capital stock of the Baltimore & Ohio Railroad Company, which Dalrymple had pledged to the defendant to secure the repayment of a sum of money loaned to him by the company. * * *

The court below seems to have considered the sales in 1860 and 1862 as wholly void and inoperative and the bailment still continuing, and instructed the jury that upon proof of the pledge, and the tender, demand, and refusal in December, 1862, the plaintiff was entitled to recover, and the measure of damages was the market value of the stock at that time, together with the dividend received by the defendant in April, 1861, deducting therefrom the amount of the loan and interest. Having thus stated the positions taken by the parties in their several prayers, and by the court below in its instruction to the jury, we shall proceed to express as briefly as we can the judgment of this court upon the questions involved, so far as they are deemed material

[15] The statement of facts has been rewritten, and parts of the opinion omitted.

to the decision of the case. In doing so, we shall confine ourselves mainly to a statement of the conclusions we have reached after a careful examination of all the authorities cited in the argument, without attempting to refer to them particularly, or to reconcile them where they may be in conflict. To do so would require this opinion to be extended to very great length without, perhaps, subserving any good purpose.

The first question that naturally presents itself for our consideration is the effect of the sale and purchase of the stock made by the defendant in November, 1860. By the terms of the contract, the loan was payable on one day's notice, and if not paid according to the agreement, the defendant was authorized without further notice to sell the stock pledged for the purpose of satisfying the same. Unquestionably, the notice given on the 13th of November was sufficient, under the contract, to entitle the defendant to sell on the 20th.

In the absence of any express agreement to the contrary, it has been held in some cases to be necessary for a pledgee before exercising the power of sale to give notice to the pledgor of the time and place of sale: Washburn v. Pond, 2 Allen (Mass.) 474; and the same rule was announced by the superior court of New York in Wheeler v. Newbold, 5 Duer (N. Y.) 29; and by the court of appeals in the same case, 16 N. Y. 392. Without expressing any opinion upon the law as laid down in those cases, it is clear it can have no application to a case where such notice is dispensed with by the contract of the parties. Here by the words of the agreement authorizing the defendant upon default to sell without further notice, we understand that when the power to sell arose, all notice of the time and place of sale was waived and dispensed with by the plaintiff, leaving upon the defendant the obligation to sell publicly and fairly for the best price he could obtain. See 2 Kent's Com. 582, 583.

A sale at the board of brokers, publicly and fairly made, would, in our opinion, have been legal and valid; and if the sale of the 20th of November had been made to a third person, it would have been a legal sale under the contract, vesting a good title in the purchaser, and terminating the bailment. It was contended by the plaintiff's counsel that the sale must in all cases be made at public auction, and that a sale at the broker's board would not be legal; and some decisions in New York were cited in support of this view.

In Brown v. Ward, 3 Duer (N. Y.) 660, it was said that a "custom has grown up (in New York), and been sanctioned by the courts, of selling stock at the Merchants' Exchange."

There is no evidence of any such custom in Baltimore, and considering the requirements of the law, and the reason and nature of the transaction, we are of the opinion that the most proper and suitable place for a sale of stock is at the Board of Brokers. There is the stock market,—the mart to which vendors and purchasers resort, by their agents, to buy and sell stock, where competition among bid-

ders is most apt to be found,—such sales are public, and unless there be in the particular case some ground for impeaching their fairness, we are of opinion they are reasonable and ought to be supported.

But, as we have seen, the defendant became itself the purchaser of the stock, and the question arises, What was the legal effect of the proceeding? Did it amount to a valid and effectual sale so as either to vest in the defendant, as purchaser, an absolute title, or to operate as a conversion of the property, break up the bailment, and the relation of bailor and bailee between the parties?

The doctrine that trustees, executors, administrators, and others holding fiduciary relations are incompetent to purchase the property held by them in trust is well settled. See Story's Eq. Jur. §§ 321–323, where the cases are collected. In section 323 the learned author says: "There are many other cases of persons standing in regard to each other in like confidential relations in which similar principles apply." Lord Chancellor Cottenham, in Greenlaw v. King, 5 Jur. 18, cited in Torrey v. Bank of Orleans, 9 Paige (N. Y.) 663, held that "the principle was not confined to a particular class of persons, such as guardians, trustees, or solicitors, but was a rule of universal application to all persons coming within the principle, which is, that no party can be permitted to purchase an interest where he has a duty to perform inconsistent with the character of purchaser." See also Keighler v. Savage Mfg. Co., 12 Md. 384, 71 Am. Dec. 600; Hoffman S. C. Co. v. Cumberland C. & I. Co., 16 Md. 456, 77 Am. Dec. 311; Cumberland C. & I. Co. v. Sherman, 20 Md. 117, 77 Am. Dec. 311. This rule rests upon grounds of public policy, and is enforced without regard to the question of bona fides in the particular case. It is clear, both upon reason and authority, that the case of pledgor and pledgee comes within the rule.

In Story on Bailments, § 319, it is said: "In respect of sales, also, there is a salutary restraint upon the pawnee to secure his fidelity and good faith that he can never become a purchaser at the sale. This rule will be found recognized equally in the common law and the Roman law."

It has been argued, on the part of the defendant, that this is a purely equitable doctrine, to be enforced only in courts of equity on grounds not cognizable at law; and while such sales are voidable in equity, they must be treated in this forum as valid.

This question is not free from difficulty, but the conclusion we have reached from an examination of the cases is clearly expressed in the third point of the plaintiff's brief.

While in cases of pure trust, where exclusive jurisdiction is in equity, resort must be had to that tribunal for relief, and sometimes, in cases of quasi trust, that court will grant relief where there are special circumstances requiring such interference, as in Hasbrouck v. Vandevoort, 4 Sandf. (N. Y.) 74, yet the relation of pledgor and pledgee, being a legal relation, its rights and duties are defined by

law, and the remedies for violation of such duties are ordinarily in a court of law.

The sale of the pledge by the defendant to itself was contrary to the faith of the bailment, forbidden, as we have shown by the citation from Story, by the common law, and might be treated by the bailor at his election as a tortious conversion of the property. In this case, no such election was made by the plaintiff. There was no transmutation of title or change of possession, and the sale being inoperative to work a conversion, the relation of the parties remained unchanged thereby. The defendant remained in possession of the stock as before, in the same manner as if the sale had been attempted, and both in fact and in contemplation of law the bailment continued. This point was decided in Middlesex Bank v. Minot, 4 Metc. (Mass.) 325. That decision was followed by the supreme court of Iowa in Bank v. Dubuque & P. R. R. Co., 8 Iowa, 277, 74 Am. Dec. 302.

Looking at the reasoning upon which those decisions rest, and the rules and principles of the law governing contracts of this description, we are of opinion that the decision of Middlesex Bank v. Minot, 4 Metc. (Mass.) 325, so far as this point is concerned, was correct. The sale of the 20th of November did not operate either to vest the title in the defendant as purchaser, or to work a conversion of the stock. The bailment continued, and if nothing more had been done subsequently, and the stock had remained in the defendant's possession, there can be no doubt that the tender and demand made on the 16th of December, 1862, would have been valid, and the refusal on the part of the defendant at that time would have given a good cause of action to the plaintiff. But it appears from the proof that before that time, in the spring of 1862, the defendant caused the stock to be sold publicly at the Board of Brokers, and it was transferred to the several purchasers. What was the effect of those sales? Having given notice to pay the loan in November, 1860, the defendant was not bound to keep the pledge; the attempted sale of the 20th of November being inoperative, and the plaintiff continuing in default, the power to sell conferred by the contract still continued, and was in fact executed by the sales made in 1862. As we have already said, no further notice was required by the contract, nor can any valid objection be made to the place and mode of sale, the same not being impeached on the ground of unfairness or bad faith. By those sales the bailment was ended; and being made, as we have said, in the lawful and valid exercise of the power of sale, there was no violation of the contract on the part of the defendant, or any tortious conversion of the stock; and therefore the plaintiff was not entitled to recover in this form of action; and the fifth prayer of the defendant ought to have been granted.

The sales and transfer of the stock made in 1862 being valid and legal, the plaintiff would have the right to recover in an action ex contractu any excess which might remain in the hands of the defend-

ant arising from the proceeds of these sales, including the dividend received on the 16th of April, 1861, with which the defendant would be chargeable after deducting the amount of the loan and interest due at that time; such excess would be simply money had and received by the defendant to the use of the plaintiff, under and in conformity with the contract; even if the sales had been tortious, we entertain the opinion that the true measure of damages would be as stated in the defendant's fourth prayer, which asserts the right of the defendant to recoup from the damages the amount of the debt; but that question does not arise in this case; the sales not being tortious, there can be no question of the right of the defendant to retain out of the sums which came to his hands the amount of the loan and interest; and even in a proper form of action, the excess only could be recovered. But the question arising upon the pleadings is not of any practical importance in this case, because it is evident from a simple calculation that the money which actually came to the defendant's hands from the sales of the stock and the dividend of April, 1861, was less than the debt and interest due, and nothing, therefore, could be recovered from the plaintiff in any form of action. * * *

But the court below erred * * * in the instruction given to the jury; the judgment will therefore be reversed on the defendant's appeal. Judgment reversed.

ALEXANDRIA, L. & H. R. CO. v. BURKE.

(Supreme Court of Appeals of Virginia, 1872. 22 Gratt. 254.)

MONCURE, P.[16] * * * But we will proceed at once to consider the only assignments of error relied on by the counsel for the appellants. They are the fifth and the sixth.

The fifth is in these words: "There being no special agreement to confer on the bank the power to sell the security, it was not competent for the bank to sell, much less Burke, Herbert & Co."

In regard to the right of a pawnee or pledgee to make the pawn or pledge available, the law is thus laid down in 2 Kent's Com. 582, marg.: "The English law now is that after the debt is due, the pawnee has the election of two remedies. He may file a bill in chancery, and have a judicial sale under a regular decree of foreclosure; and this has frequently been done in the case of stock, bonds, plate and other chattels, pledged for the payment of the debt. But the pawnee is not now bound to wait for a sale under a decree of foreclosure, as he is in the case of a mortgage of land (though Lord Chancellor Harcourt once held otherwise), and he may sell without judicial process, upon giving reasonable notice to the debtor to redeem." To the same effect is the law laid down in 2 Story's Eq. §

[16] The statement of facts and parts of the opinion are omitted.

1008. In ordinary cases no special agreement is necessary to confer on the pledgee power to sell the property pledged. The power is, ordinarily, incident to the pledge.

There are, however, exceptions to the general rule. The case of Wheeler v. Newbould, 16 N. Y. 392, cited in the petition, is a case in which there was such an exception. There it was held that "the pledge of commercial paper as security for a loan of money does not, in the absence of a special power for that purpose, authorize the pledgee, upon the non-payment of the debt, and upon notice to the pledgor, to sell the securities pledged, either at public or private sale; but he is bound to hold and collect the same as they become due, and apply the money to the payment of the loan." The natural and proper mode of making such a security available was by collecting the money, and not by selling the security. The notes pledged in that case were due at short periods, and it could not have been intended by the parties that they might be sold by the pledgee, if the principal debt were not paid at maturity. But the same reason does not apply to property which can be made available only by a sale, or to make which available a sale is the proper and legitimate mode. In this case, the pledge was of coupon county bonds, which are an ordinary subject of sale, and the proper and legitimate, if not the only, mode of making them available is by a sale. In Wheeler v. Newbould, the existence of the ordinary rule as laid down in Kent and Story, supra, is admitted, and those authorities are referred to, and the cases of Willoughby v. Comstock, 3 Hill (N. Y.) 389, and Dyckers v. Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87, are cited, in which the ordinary rule was applied to pledges of stock.

We, therefore, think it was competent for the bank to sell the bonds in this case, or would have been if the bank had not transferred them to Burke, Herbert & Co. We also think that it was competent for Burke, Herbert & Co., as transferees of the note and bonds, to make the sale.

It seems to have been conceded by the counsel for the appellants, in argument, that the Exchange Bank would have had a right to sell the bonds, and also that the assignment of the note carried with it an assignment of the pledge. In this case, the bonds were expressly transferred along with the note. But the counsel argued that the original pledgee was, in effect, a trustee, who could not delegate his trust, and therefore, that an assignee of the debt is not a trustee, and cannot sell the property pledged, though he may have it sold under a decree of a court of chancery. The counsel admitted that he could find no authority to sustain this view. The power to sell property pledged for the security of a debt does not arise from any peculiar trust reposed in the original creditor, but is an incident to the pledge, and a part of the security of the debt. It follows the debt into whosesoever hands it may come. That no authority can be found, or was not found, by the learned counsel to sustain his view, goes far, very

far, to show that it is unsound. In the commercial world it must often occur that debts secured by a pledge are assigned, and that the assignee exercises the ordinary right of selling the subject of the pledge on the non-payment of the debt. We have not sought for cases of this kind, but doubt not there are many in the books. If there are not, it is doubtless because the right has never before been questioned. On principle, we think there is no doubt.

The sixth assignment of error is in these words: "Even if the creditors had authority to sell without judicial proceedings, personal notice to redeem, and of the time, place and manner of the intended sale, must be given to the pledgor. No such notice was given. 16 N. Y. 392."

Certainly before a sale can be made by the pledgee, without judicial proceedings, he must give reasonable notice to the debtor to redeem. Such notice is indispensable. 2 Kent's Com. 582, marg.; Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248. Such notice was given in this case. So also reasonable notice must be given to the debtor of the time and place of sale. Id.; 2 Story's Eq. § 1008. "The creditor will be held at his peril to deal fairly and justly with the pledge, both as to the time of the notice and the manner of the sale." 2 Kent's Com. supra. It does not appear that in this case any formal notice of the time and place of sale was served upon or given to the debtor, but it does appear that the debtor had actual notice thereof, and that is sufficient. It is equivalent to the most formal notice. The only object of requiring notice to be given in such a case is to inform the debtor of the time and place of sale; and when he is already otherwise fully informed on the subject, to require a further and more formal notice to be given him is to require a vain thing. The case is not like a legal proceeding, in which service, or waiver of notice, should appear in the record. Here the whole matter is in pais, and the question is, Did the debtor have actual notice of the time and place of sale? The safest course is to have a formal written notice served upon him, for then the fact of notice can be easily proved. If this safe course be not pursued, the creditor must, at his peril, be prepared to prove otherwise that the debtor was informed of the time and place of sale a reasonable time before the same was to take place.

Here there can be no doubt about the fact that the debtor had such information. The written notice to redeem was very specific, and notified the debtor that unless payment of the debt should be made on or before a certain day, the creditor would thereafter proceed to sell the bonds and apply the proceeds to the payment of the debt. The debtor, not having complied with this requisition to redeem, had every reason to expect that his failure would soon be followed by a sale, according to the notice. Accordingly, early in December following, the very next month, a sale of the bonds was advertised in the Alexandria Gazette, a newspaper published in the city which was the chief terminus of the road of the Alexandria, Loudoun & Hampshire Rail-

road Company, and the place, no doubt, where the principal office of the company was located and their chief officers resided. The day fixed for the sale was the 15th of January, more than a month after the advertisement was first inserted in the newspaper, and such insertion was to be continued weekly until the day of sale. If the fact of actual notice could not be inferred from these strong circumstances, there is other and conclusive evidence in the record of such actual notice. The injunction was obtained on the 8th day of January 1870, one week before the day fixed for the sale, and a copy of the advertisement is filed as an exhibit with the bill, thus conclusively showing that the plaintiffs were fully informed of the time and place of sale, just as much so as if a copy of the advertisement had been served upon them.

We are, therefore, of opinion that there is no error in the decree, and that it ought to be affirmed. Decree affirmed.

FOOTE v. UTAH COMMERCIAL & SAVINGS BANK.

(Supreme Court of Utah, 1898. 17 Utah, 283, 54 Pac. 104.)

MINER, J.[17] * * * No doubt, the terms of the contract govern the rights of the parties as to the time, place, and notice of sale, and should be strictly pursued, without evasion or deception. The officers of the bank were empowered to sell at public or private sale. They chose to make the sale public, and were therefore required to conform to the rules governing public sales so far as publicity was concerned. This they did not do. The power of sale must be exercised with a view to the interests of the pledgor as well as the pledgee, and the sale should not be forced for barely sufficient money to secure the payment of the debt, when the securities are known to be of more than double the value of the debt. The pledgee, under whom such an authority to sell is vested, must exercise it under a trust for the debtor's benefit as well as his own. The sale must be fair, and the contract must be construed benignantly for the debtor's interest as well as that of the pledgee. Coleb. Coll. Sec. § 118; Trust Co. v. Rigdon, 93 Ill. 458–467; Griggs v. Day, 32 Am. St. Rep. 704, note 730 (s. c. 136 N. Y. 152, 32 N. E. 612, 18 L. R. A. 120); Montague v. Dawes, 14 Allen (Mass.) 373. In Montague v. Dawes, supra, it is held that: "One who undertakes to execute a power of sale is bound to the observance of good faith, and a suitable regard for the interests of his principal. He cannot shelter himself under a bare literal compliance with the conditions imposed by the terms of the power. He must use a reasonable degree of effort and diligence to secure and protect the interests of the party who intrusts him with the power. A stranger to the proceedings, finding them all correct

[17] Parts of the opinion are omitted.

in form, and purchasing in good faith, may not be affected by his unfaithfulness. But, whenever his proceedings can be set aside without injustice to innocent third parties, it will be done upon proof that they have been conducted in disregard of the rights of the donor of the power. When a party who is intrusted with a power to sell attempts also to become the purchaser, he will be held to the strictest good faith, and the utmost diligence for the protection of the rights of his principal. If he fail in either, he ought not to be permitted thereby to acquire any irrevocable rights which he can set up against the party whose interests he has sacrificed."

It is evident to our minds that in the manipulation and conduct of this sale, and in the purchase of the stock, the bank did not exhibit that fair, benignant, strict good faith, and reasonable degree of effort and diligence, that was justly required, in order to secure and protect the interests of the party who intrusted it with the power. * * *

STOKES v. DIMMICK.

(Supreme Court of Alabama, 1908. 157 Ala. 237, 48 South. 66.)

Suit by J. W. Dimmick against M. C. Stokes. Decree for complainant. Defendant appeals.

SIMPSON, J.[18] The bill in this case was filed by the appellee, against the appellant, and sought to collect certain debts, by the appointment of a receiver and the sale of certain property which had been pledged for the payment of said debts. The allegations of the bill are, in substance: That said appellant (Stokes) had obtained from one Smith an option on the timber on certain lands, and had also obtained from one Robinson a conveyance of the timber on certain other lands, to be paid for in the future; that on August 23, 1904, said respondent (Stokes) entered into an agreement with the said complainant (Dimmick) by which, in consideration of $5,000 cash, and $13,699.60 due November 23, 1904, said Stokes conveyed to said Dimmick one-half interest in said timber contracts, also 166⅔ shares of the capital stock of the Alabama Central Railway, being two-thirds of the entire stock of said railway company, and it was therein agreed that said Dimmick should receive, from the proceeds of timber sold, $16,699.61 and any further sums advanced by him to finish said railroad, before Stokes should participate in the proceeds; also, that the interest of Stokes in the timber and his stock in said railway should be held by Dimmick to secure any debts that Dimmick might pay for Stokes or said railway company, not stipulated in the contract. It was also agreed that Stokes should be general manager of said railway, "subject to the approval of the stockholders." On October 18, 1904, said Dimmick loaned to said Stokes $750 and took his note

[18] Parts of the opinion are omitted.

therefor, due January 18, 1905; the agreement being—as shown by a letter and the note—that the stock in said railway owned by Stokes, being 83⅓ shares, should be held as collateral by Dimmick to secure said note, also that said note and the $16,699.61 should be paid out of the proceeds of timber sales before Stokes should participate in profits from sales of timber or property of said railway. On October 27, 1904, Stokes and Dimmick entered into another contract, reciting that Dimmick had furnished $3,750, and agreed to furnish $13,699.61 to pay Scott & Sons for their interest in the capital stock of said railway and their interest in the timber contracts, and had agreed to furnish $3,000 to complete the first five miles of said railway, and Stokes pledged his stock in said railway and his interest in the timber contracts to secure the payment of said several amounts, aggregating $20,500, which were to be paid out of sales of timber. On June 21, 1905, M. M. Smith, the party from whom 3,500 acres of said timber land had been bought, entered into an agreement with said Stokes and Dimmick, by which certain parts of the timber were reconveyed to said Smith, in consideration of which said Smith acknowledged full payment for the timber, with certain other stipulations. On August 26, 1905, one Robinson, from whom the other timber had been purchased or optioned, executed a paper extending the time of payment for "two years from October 27, 1905."

The bill alleges: That said complainant, Dimmick, has paid out in all $42,000, or more, under the various agreements, for which said timber and stock in said railway are pledged; that the time allowed for cutting said timber will expire on October 27, 1907; that it will require at least four months to remove it; that Stokes has no other property; that the contracts do not authorize complainant to sell said timber; that said Stokes is hostile to him and refuses to agree to sell said timber. * * * The bill prays: First, for a receiver of the Robinson land and of the shares of stock, that said property be sold to the highest bidder, and the proceeds brought into court, and applied to the payment of the debts due complainant, with a reasonable attorney's fee for the collection of the $750, in accordance with the provisions of the note; second, that it be referred to the register to ascertain the amount due complainant, under said several contracts; third, that, upon the coming in of said report, a decree be rendered "directing that all said property pledged for the payment of said debts, so ascertained, under the orders and directions of this court," be sold; and, fourth, for general relief. * * *

The various contracts set out in the exhibits and averments of the bill show that Dimmick advanced the sums mentioned to Stokes, and Stokes thereby became his debtor, and his interest in the timber, as well as his stock in the railway, was pledged to secure the payment of said sums of money. The exhibits are part of the bill, and will, of course, be looked to in ascertaining the terms of said indebtedness. The provisions in said contracts that said Dimmick was to be first

paid out of the sales of the timber do not indicate that he was not entitled to be paid at all, if he and Stokes could not agree on a sale of the timber; but this was a provision for the protection of Dimmick, declaring his lien on the share of Stokes, and that Stokes was not to participate in the proceeds of sale until Dimmick was paid. The construction contended for by the appellant would enable Stokes, by refusing to agree to the sale of timber, to prevent the complainant from ever collecting the debts due him. As it is shown that the limited time for the removal of the timber is near at hand, that the state of feeling between the parties is such that it is not probable they can agree, and that the property is pledged to the complainant, but that no way is provided by which he may enforce his lien, it is the proper province of a court of equity to supply the remedy and enforce the lien. There is no effort to enforce a personal liability against Stokes, but only to subject the property which he has pledged for the payment of the debt, and, even if it be true, as contended by the appellant, that no time is fixed for the payment of the debts, the law will presume a present liability. Waring v. Henry & Mott, 30 Ala. 729.

The contention of appellant that the bill, in this case, is an effort to "split up" the securities, by selling only a part thereof, is not borne out by the record. The bill and exhibits show that not only one tract, but all the timber interests were pledged for the payment of the various amounts advanced by said Dimmick; and while the first prayer for relief in the bill does mention only the Robinson land, in asking for a receiver, yet the third prayer is for a decree ordering the sale of all of the property pledged. It is true that, in this second prayer, there is in the record an omission of some words, but the intent is clear, and, as there was no decree on demurrer to it, it must be construed as stated, and the prayer for general relief is also added. There is no uncertainty as to the objects sought by the bill. It seeks no personal decree against Stokes, but shows that all of the timber interests are pledged, and seeks to enforce that lien. As to the manner of enforcing that lien, the court will decide. * * *

The decree of the chancellor is affirmed.

VII. The Termination of the Pledge [19]

BELL v. MILLS.

(Circuit Court of Appeals of United States, Ninth Circuit, 1903. 123 Fed. 24, 59 C. C. A. 104.)

GILBERT, Circuit Judge.[20] * * * It is contended that after the death of the pledgor the bank could only procure the sale of the pledged property by a proceeding in the probate court, since sections 3001 and 3002 of the Civil Code, requiring that a demand be made upon the pledgor, "if he can be found," and that actual notice of sale be given him, cannot, in the event of his death, be complied with, for the reason that he cannot then be found or served. In brief, it is contended that the provisions of those sections of the Civil Code were intended to furnish a remedy only as against a living pledgor. Is this their true construction? It is not disputed that the executors were substituted to the right of the pledgor in the right to redeem the pledged property. We think that if the right and lien of the pledgee survives the death of the pledgor—and we hold that it does—it must necessarily follow that the remedy given by the statute in the absence of a substituted statutory remedy also survives. The plaintiff in error produces no authority to sustain her contention, and we discover nothing in the statutes of California which makes the law of that state in regard to pledges different in this respect from the law generally applied to that subject. In Buffalo German Insurance Co. v. Third National Bank, 19 Misc. Rep. 564, 43 N. Y. Supp. 550, it was held that a pledge subject to sale on default may be sold after the pledgor's death on demand for payment made to his executors, and notice to them of the sale. The court remarked that this right of the pledgors "cannot be seriously questioned."

It is next contended that even if, under section 3002 of the Civil Code, the pledged property of a deceased pledgor can be sold in the manner and under the notice prescribed by the statute, the notice must be given, not to the executors of the will, but to the testator's heirs and devisees. To admit this proposition is by implication to deny the right of the plaintiff in error to institute the present action. If the executor has the right to represent the estate in this proceeding, and to demand damages for the conversion of the shares of stock, the executor was the proper person of whom to demand payment, and to whom to give notice of the sale. Under the laws of California, the executor represents the title of his testator in administering the

[19] For discussion of principles, see Doble, Bailm. & Carr. § 89.

[20] The statement of facts and parts of the opinion have been omitted.

assets of the estate. The interest of the heirs to pledged property is certainly no greater than their interest in mortgaged real estate. In Bayly v. Muehe, 65 Cal. 345, 3 Pac. 467, 4 Pac. 202, 486, it was held that the heirs of a deceased mortgagor are not necessary parties to an action against the administrator to foreclose the mortgage. It has also been held that a judgment in ejectment against the administrator concludes the heirs, although they were not parties to the action. Cunningham v. Ashley, 45 Cal. 485; De Halpin v. Oxarart, 58 Cal. 101.

Reliance is placed on section 1524 of the Code of Civil Procedure, which provides: "Interests in personal property pledged and choses in action may be sold in the same manner as other personal property when it appears for the best interest of the estate."

It is argued for this section that it places pledged property of a decedent within the operation of the statute respecting the administration of estates, and that, if a sale of such property be had upon demand and notice after the death of the pledgor, it is done in contravention of the statute. We think that the section so quoted has a meaning directly the opposite of that which is claimed for it. It clearly recognizes the possession and lien of the pledgee as surviving the death of the pledgor. Its effect is to permit the administrator to sell the interest of the estate in pledged property subject to the lien. To authorize the sale subject to the lien is to declare the lien a subsisting one, and to affirm the right of the pledgee to pursue the remedy by demand, notice, and sale, which is afforded him by law. It is to admit, also, that, after a sale by the administrator subject to the lien, the pledgee shall still possess the right to enforce his lien in the only method known to the law—by a sale had upon demand and notice. Section 1524 was intended only to confer upon the administrator, in addition to his conceded right to redeem the pledged property, the right to sell the same subject to the pledge—a right of which he can avail himself only before such time as the pledgee shall have taken steps to enforce his lien by selling the property. Property pledged by the decedent is not property of the estate in the hands of the administrator. This must necessarily be so. The lien of the pledgee is dependent upon possession. If possession could be taken by the administrator, the lien would be destroyed.

It is argued that, conceding that the bank had a special power of sale by virtue of the pledge, the power was revoked by the death of the pledgor; citing Hunt v. Rousmanier, Adm'r, 8 Wheat. 174, 5 L. Ed. 589. That was a leading case, in which it was held that a power of attorney, containing no words of conveyance or assignment, but a simple power to sell and convey, is revoked by the death of the grantor thereof. The court said: "We think it well settled that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death." But the court recognized an exception to the rule in the case of a power coupled with an interest, and, for illustration of one form of such power, said: "A power to A. to sell

for his own benefit would be a power coupled with an interest." But it is said that an express power to sell a pledge cannot, in California, be coupled with an interest, since the title to the pledge remains in the pledgor. The laws of California do not change the nature of pledgee's liens as recognized at common law. It is true that by section 2888 of the Civil Code, which provides, "Notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property subject to the lien," the title still remains in the pledgor. Nevertheless section 2988 provides as follows: "The lien of a pledge is dependent on possession and no pledge is valid until the property pledged is delivered to the pledgee or to a pledgeholder as hereinafter prescribed." The Supreme Court of California has held that a trust deed is mere security, and that the death of the grantor of such a deed does not revoke the power of sale therein contained. More v. Calkins, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128. In Jones on Pledges, § 631, it is said: "A power of sale, whether given in a mortgage or in a pledge, is an authority coupled with an interest, and passes to the pledgee's representative." In Schouler's Executors & Administrators, § 203, it is said: "Debts, on the other hand, owing from the deceased, and secured by pledge or mortgage of his personal property, or a lien thereon, leaves the surplus as general assets of the estate, beyond such sum as may be required for discharging the security." The power vested in a pledgee to sell pledged property is not a power granted by the pledgor, or to be exercised in his name. It is a power conferred upon the pledgee by statute—a power absolute in its terms. Said the learned Chief Justice in Hunt v. Rousmanier: "But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name." The power is not revoked by the death of the pledgor. Section 1524, Code Civ. Proc.

It is urged that the published notice of the sale, as shown by the complaint, was insufficient, for the reason that it did not state that the shares to be sold were pledged shares, or that they belonged to the estate of the decedent. We are unable to see how the estate of the decedent could have been benefited by inserting these omitted facts in the notice. The statute provides that the sale of such property shall be made "in the manner and upon notice to the public usual at the place of sale." It does not otherwise specify what the notice shall contain. There is no averment in the complaint that the notice in this case was not the notice which is usual at the place of sale. The notice to the executors specified the shares, and stated that they were the shares of stock pledged by the decedent to secure the payment of his notes to the bank, describing the same. The published notice described the shares, and gave notice that they were to be sold by public auction at a specified time and place. It is not alleged that, when offered for sale, any information concerning the stock or its ownership, or the hypothecation thereof, was withheld from the bid-

ders. In Earle v. Grant, 14 R. I. 228, 230, it was said: "The complainant also seeks to avoid the sale because the advertisement, in advertising the shares for sale, did not name either the pledgor or the pledgee. It does not appear that it is customary to give names in such advertisements. No case is cited which holds that it is necessary to give them."

We think the averments of the complaint, in the light of the statutes applicable thereto, show that the sale was valid and lawful. * * *

INNKEEPERS

I. Definition and Distinctions [1]

FAY v. PACIFIC IMPROVEMENT CO.

(Supreme Court of California, 1891. 93 Cal. 253, 26 Pac. 1099, 16 L. R. A. 188, 27 Am. St. Rep. 198.)

DE HAVEN, J.[2] * * * 1. An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation,—an hotel. In Wintermute v. Clarke, 5 Sandf. 247, an "inn" is defined as a public house of entertainment for all who choose to visit it, and this definition was quoted with approval by this court in Pinkerton v. Woodward, 33 Cal. 596. The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation, or agreement as to the duration of their stay, marks the important distinction between an hotel or inn and a boarding-house. This difference is thus stated in Schouler on Bailments: "An inn is a house where the keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment, while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode." Schouler, Bailm. p. 253.

We think that the evidence in this case is full and complete to the point that the Hotel Del Monte was a public inn. It not only had a name indicating its character as such, but it was also shown that it was open to all persons who have a right to demand entertainment at a public house; that it solicited public patronage by advertising, and in the distribution of its business cards, and kept a public register in which its guests entered their names upon arrival, and before they were assigned rooms; that the hotel, at its own expense, ran a coach to the railroad station for the purpose of conveying its patrons to and from the hotel; that it had its manager, clerks, waiters, and in its interior management all the ordinary arrangements and appearances of an hotel, and the prices charged were for board and lodging. These facts were certainly

[1] For discussion of principles, see Dobie, Bailm. & Carr. § 90.

[2] Parts of the opinion are omitted.

sufficient to justify the court in finding, as it did, that the appellant was an innkeeper. Krohn v. Sweeney, 2 Daly (N. Y.) 200. Nor was the force of this evidence in anywise modified by the fact that the hotel was not immediately upon a highway, or that the grounds upon which it stood were inclosed, and the gates closed at night. The location of the hotel, the extent of the grounds surrounding it, and the manner in which these grounds were improved, and reserved for the exclusive use and enjoyment of those who patronized it, doubtless made the hotel more attractive to those who chose to make a transient resort of it, but did not convert it into a mere boarding-house. An hotel is none the less one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of all transient persons who may have occasion to patronize it. "Modes of entertainment alter with the fashion of the age, and to preserve a clear definition is not easy. It is not wayfarers alone, or travelers from a distance, that at the present day give character to an inn; the point being rather that people resort to the house habitually, no matter whence coming or whither going, as for transient lodging and entertainment." Schouler, Bailm. p. 249.

2. The evidence shows that the plaintiff was a guest, and not a boarder. The fact that upon her arrival, and before being assigned to her room, she ascertained what she would have to pay for the room and board, is not sufficient of itself to show that she was not received as a guest. Pinkerton v. Woodward, 33 Cal. 597, 91 Am. Dec. 657; Hancock v. Rand, 94 N. Y. 1, 46 Am. Rep. 112; Jalie v. Cardinal, 35 Wis. 118; Hall v. Pike, 100 Mass. 495; Woolen Co. v. Proctor, 7 Cush. (Mass.) 417. The Del Monte being a public hotel, in the absence of evidence showing that plaintiff went there as a boarder, the presumption would be that she went there as a guest. Hall v. Pike, supra. Not only does the evidence fail to overthrow this presumption, but the testimony of the plaintiff shows that she was there as a mere temporary sojourner, without any agreement as to the time she should stay, and with only the intention on her part of resting a week or two, and then proceeding to the east. She obtained no reduction of price in consideration of an agreement to remain a definite time, or as a boarder; nor was there anything said from which it could be inferred that there was any understanding between her and the defendant that she was to be received as a boarder, and not as a guest. * * *

II. Who are Guests [3]

LUSK v. BELOTE.

(Supreme Court of Minnesota, 1876. 22 Minn. 468.)

BERRY, J.[4] In August, September and October, 1872, the defendant was keeping the "Park Place Hotel," a public inn and boarding-house, in the city of St. Paul. On September 20, 1872, the plaintiff, his wife and four children being inmates of the hotel, a gold watch belonging to plaintiff, and certain articles of jewelry belonging to two of the children mentioned, were stolen from the rooms occupied by the plaintiff and his family. The jewelry consisted of "ordinary articles of wearing apparel and ornaments" of the plaintiff's two children, to whom the same belonged, and was brought to the hotel when they came there. The plaintiff's wife and six children became inmates of the hotel on August 7, 1872, and (with the exception of two children who left a few days before the theft) remained there until some time in October following. The plaintiff was not a resident of this state, but at the time when they came to the hotel his wife and children were living, and for three or four years previous had been living, in St. Paul, sometimes keeping house and sometimes staying at a hotel or boarding-house, the plaintiff being in the habit of making them an occasional visit as often as two or three times a year. The plaintiff arrived at St. Paul and became an inmate of the hotel about September 10, 1872, and remained about four weeks.

An inn-keeper is by the common law responsible for the loss, in his inn, of the goods of a traveller who is his guest, except when the loss arises from the negligence of the guest, or the act of God, or of the public enemy. 2 Kent, 592–597; Shaw v. Berry, 31 Me. 478, 52 Am. Dec. 628; Sibley v. Aldrich, 33 N. H. 553, 66 Am. Dec. 745; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405; Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655; 1 Chit. Cont. (11th Am. Ed.) 674–677, and notes. But this strict liability exists only in favor of travellers. As the articles of jewelry stolen belonged to the plaintiff's children, being their "ordinary articles of wearing apparel and ornaments," and were brought to the defendant's inn when such children came there and became inmates thereof, the liability of defendant, as respects their loss, must depend upon the status of the persons to whom the same belonged.

[3] For discussion of principles, see Doble, Bailm. & Carr. § 91. Besides the cases under this heading, see, also, Fay v. Pacific Improvement Co., ante, p. 146.

[4] Part of the opinion is omitted.

Considering the length of time during which, and the manner in which they had been living in St. Paul before they became inmates of the defendant's inn, they must be regarded as, *in fact*, dwellers in and inhabitants of St. Paul. There is no reason why they may not properly be so regarded, although their domicile was, *in law*, in another state. They were certainly not travellers in any just sense of the word, for persons who have dwelt in a city no larger than St. Paul do not become travellers by changing their dwelling place from one part of it to another. It is manifest, therefore, that, as respects the jewelry stolen, the verdict cannot be sustained; for, upon the evidence, it is obviously based upon the defendant's supposed liability for the loss of the same under the rule above mentioned—a rule, as we have seen, applicable only as between an innkeeper and a traveller.

In reference to the plaintiff, it appears that he was not a resident of this state, and that he came to defendant's inn from some place without this state upon a visit to his family. There is no room, upon the evidence, to doubt that he came to defendant's inn, and was received there, as a traveller, and in no other character. His purpose evidently was to make a flying visit to his family, and a merely temporary stay in St. Paul, where he remained about a month only. Under such circumstances, unless something appears affirmatively to the contrary, his status as a traveller, like any other status, once shown to exist, is to be presumed to have continued. Neither the agreement by which he was to pay special rates for himself and family, lower than those ordinarily charged for transient guests, nor the fact that he remained in the inn for a month, nor, so far as we discover, any other fact which appeared in the case, furnish any evidence that his character was changed from that of a traveller to that of a boarder. Jalie v. Cardinal, 35 Wis. 118, and cases cited. There was, therefore, no error in the instruction given to the jury to this effect. As respects, then, the plaintiff's watch, we see no reason why the evidence was not sufficient to charge defendant for its loss. * * *

CRAPO v. ROCKWELL et al.

(Supreme Court of New York, Trial Term, Albany County, 1905. 48 Misc. Rep. 1, 94 N. Y. Supp. 1122.)

Action by Jennie Crapo against Hiram J. Rockwell and another. On motion for nonsuit reserved until after verdict. Complaint dismissed.

The defendants are proprietors of the Ten Eyck Hotel, in Albany, N. Y. The plaintiff, while an occupant of certain rooms in the Annex connected with said hotel, lost and sustained injuries to her property in such rooms. This action is based on the alleged

common-law liability of the defendants as innkeepers. The defendants allege that the relationship of innkeeper and guest did not exist between them and the plaintiff, but that the latter was a permanent lodger.

COCHRANE, J.[5] The strict rule of the common law has declared for centuries, and still declares, that an innkeeper is the insurer of the property of his guest, and liable for its loss for any cause whatever, unless such loss occurs from the neglect of the guest or the act of God or the public enemy. Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405.

This rigorous rule had its origin in the feudal conditions which were the outgrowth of the Middle Ages. In those days there was little safety outside of castles and fortified towns for the wayfaring traveler, who, exposed on his journey to the depredations of bandits and brigands, had little protection when he sought at night temporary refuge at the wayside inns, established and conducted for his entertainment and convenience. Exposed as he was to robbery and violence, he was compelled to repose confidence, when stopping on his pilgrimages over night, in landlords who were not exempt from temptation; and hence there grew up the salutary principle that a host owed to his guest the duty, not only of hospitality, but also of protection. With the march of civilization and the progress of commercial development, the conditions in which the common-law liability of the innkeeper to his guest originated have passed away; but other conditions exist, which render it wise and expedient that the modern hotel keeper should respond for the loss of his guest's property while he is extending to the latter for compensation his hospitality, and there has consequently been no relaxation in the rule of his common-law liability, except as such liability has been modified by statute, which modifications do not apply to this case.

While there is no doubt about the existence of the above rule, a question arises as to its application to the facts of this case. It is urged by the defendants that the plaintiff was not their guest in the sense in which that term is used in the rule above referred to. The idea has always existed that the relationship of innkeeper and guest involved a visit or sojourn, on the part of the latter, of a transitory nature. The primary and fundamental function of an inn seems clearly to have been to furnish entertainment and lodging for the traveler on his journey. This at all times seems to have been its distinguishing feature. This idea has been expressed in the literature of ages, in history, sacred and profane, in fiction, and in poetry. So true is this that the term "inn" seems always to have been used in connection with the corresponding notion of travelers seeking the accommodation and protection of the inn. Thus the

[5] Parts of the opinion are omitted.

Christian era dawned on a Judean scene, where travelers away from home, who had gone up to be taxed pursuant to the decree of the Roman Emperor, sought refuge in a manger, "because there was no room for them in the inn." Sir Walter Scott characterizes the inn of the old days of Merry England as "the free rendezvous of all travellers," of which the bonny Black Bear of Cumnor village, not conducted merely, but "ruled, by Giles Gosling, a man of a goodly person," as landlord, was a typical instance. And so the most illustrious bard of England says, referring to the time of approaching twilight, with the west glimmering with streaks of day, "now spurs the lated traveller apace to gain the timely inn."

Turning from the pages of literature to those of legal lore, we find the same idea is carried out with remarkable constancy. An inn is defined by Bacon to be a house for the entertainment of travelers and passengers, in which lodging and necessaries are provided for them and for their horses and attendants. * * *

It is needless to multiply authorities. They are unanimous in conveying the idea that the relationship of innkeeper and guest applies to travelers, and I have discovered none which gives any other intimation.

The facts in this case fail to show that, when the plaintiff sustained the loss for which she seeks to make the defendants responsible, the relationship of innkeeper and guest existed. She went to Albany in September, 1902, having just prior thereto married John M. Crapo, a business man of that city. With her husband she lived in various boarding houses until September, 1903, when they took rooms at the Ten Eyck Annex, where, with the exception of an absence of about five weeks at Bar Harbor, plaintiff continued to reside until February, 1905. The loss occurred in January of the latter year. Plaintiff's husband died at the Annex in November, 1904. He had resided and been in business in Albany since his marriage to plaintiff, and prior thereto. After their marriage he transferred his business to the plaintiff, and she is still conducting the same in Albany. There is no pretense that either she or her husband had any other residence than at the Ten Eyck Annex during the time they were there. Plaintiff testified on the trial that she resided at the Ten Eyck Annex at the time of the loss and injury to her property. When she first went there, she made the agreement for the rooms which she and her husband occupied. The defendants' evidence is that she received special rates which were charged to permanent boarders. Plaintiff denies knowledge of this, and says nothing was said to her on that point. On this motion her testimony must be assumed to be true; but she states that, although the hotel clerk exhibited to her various suites of rooms, he referred her to the defendants for her final arrangements, and, although different rooms were occupied at various times during her stay at the Annex, in each instance the hotel clerk either

saw defendants or referred plaintiff to them for prices and final arrangements. She moved into her rooms her piano, thus indicating more than an intention to make a temporary sojourn. The property which is the subject of this action was not of a character such as is usually taken to hotels by transient guests.

This statement of facts, which is a brief résumé of the plaintiff's testimony in her own behalf, shows that the Annex was the plaintiff's home, her permanent abiding place, and that she was not there merely for temporary accommodation or as a transient guest. It is true plaintiff testified that, when she first hired the rooms, the defendants asked whether she wanted them for 1, 2, or 3 weeks, and that she told them she could not say, as she was "contemplating housekeeping." Her subsequent residence of 17 months at the Annex proves that if, when she first went there, she contemplated housekeeping, such contemplation never ripened into an intention. I do not mean to say that a resident of Albany may not go to one of the hotels of that city and establish between himself and the hotel keeper the relation of innkeeper and guest. It may be assumed for the sake of the argument that such relationship existed between these parties when plaintiff first went to the Annex; but, if such was the case, that relationship by the lapse of time was lost long before her property was lost. The Ten Eyck is an inn where transient guests are received. But the evidence is that permanent lodgers also reside there, and as to the latter the defendants certainly are not innkeepers simply because they keep an inn. At common law an innkeeper was bound to receive all guests, provided he had accommodations and they were not objectionable persons. It cannot be claimed here that these defendants were under any legal obligation to permit the plaintiff to occupy the rooms in question. She at no time had a right to demand the same. * * *

I have not overlooked the fact that no definite time was fixed on, and that the parties were at liberty on either side to terminate the agreement at any time. While such fact might be an important, or even a controlling, circumstance in some cases, it cannot have much significance where a party lives in a hotel for as long a period as the plaintiff did in this case. It is not possible to regard her in the light of a transient guest. I believe that no case can be found which goes to that extent. "An innkeeper is subject to extraordinary liability, and a person claiming to enforce such liability must show a case clear beyond all reasonable doubt." Ingalsbee v. Wood, 36 Barb. (N. Y.) 455. As it appears from the plaintiff's testimony that the relationship of innkeeper and guest did not exist between the defendants and herself, it follows that the complaint must be dismissed.

Complaint dismissed, with costs.

AMEY v. WINCHESTER.

BUCKLEY v. SAME.

(Supreme Court of New Hampshire, 1896. 68 N. H. 447, 39 Atl. 487, 39 L. R. A. 760, 73 Am. St. Rep. 614.)

Separate actions of "case" by John T. Amey and W. P. Buckley against A. M. Winchester, an innkeeper, for the loss of property. Facts found by the court. Near the entrance to the dining room of the defendant's hotel in Manchester, he has a rack on which his guests are invited to deposit their hats while eating their meals. On the evening of January 8, 1895, he provided in his dining room a banquet for a club, under a contract by which the club agreed to pay a specified sum for each plate. About 100 persons, mainly residents of Manchester, attended the banquet. The plaintiffs were not members of the club. They arrived at the hotel that evening, registered their names, and were assigned a room, which they occupied. They attended the banquet by invitation of the club, which paid for their plates. On entering the dining room, they, in common with others, deposited their hats on the rack. About 11 o'clock they left the banquet, intending to return before it closed, and, without taking their hats, went to their room, where they remained more than an hour. On their return they found the banquet ended, the doors of the dining room closed, and their hats missing. They lodged at the hotel that night, and the next morning demanded their hats of the defendant, who was unable to produce them, and refused to pay for them. There was no actual negligence on the part of the defendant. Judgment for defendant.

BLODGETT, J. To subject the defendant to liability as innkeeper, it must appear not only that the plaintiffs' goods were lost at his inn, but that he was acting in the capacity of innkeeper when the goods were lost, and that the plaintiffs were his guests; or, in other words, that the plaintiffs were at the inn for purposes which the common law recognizes as the purposes for which inns are kept, namely, the accommodation and entertainment of travelers and wayfaring men, and not for those who may be there for some special purpose not connected with passage or travel. Calye's Case, 8 Coke, 32, and note, 1 Smith, Lead. Cas. *131; Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762; Fitch v. Casler, 17 Hun (N. Y.) 126; Gastenhofer v. Clair, 10 Daly (N. Y.) 265, 266; 11 Am. & Eng. Enc. Law, 20, 21; McDaniels v. Robinson, 62 Am. Dec. 590, note.

Upon the facts as reported, we think the rigorous rule that makes the landlord of an inn responsible for the goods of his guests under almost all circumstances, and without proof of negligence or fault on his part or of those in his employ, cannot be extended so as to protect the plaintiffs, for, as to the banquet where the loss occurred, and which they attended on the invitation and at the expense of the

club, the plaintiffs are justly to be regarded as its guests, and not of the defendant, as innkeeper or otherwise, who simply provided the banquet as caterer under a contract with the club, without any lien or claim for compensation against its guests, and with no right or power to exclude anybody from participating in its festivities whom the club might properly invite. Neither by contract nor by operation of law was the defendant acting in the character of innkeeper as to the club, and still less as to its guests, who would have had no right whatever to attend except upon its invitation. Both the club and its guests came, not as ordinary travelers to an inn, but as to a banquet, for the purpose of participating in and enjoying its festivities. And likewise as to both the fact that the defendant chanced to be keeping an inn, and served the banquet there, makes his liability no greater than that of any other person not an innkeeper, who might have taken and executed the contract, either at the inn or elsewhere. One may be an innkeeper without being a club caterer, or he may be a club caterer without being an innkeeper, or he may be both; but, if he is, the two employments are so far separate and distinct in respect of duties and liabilities as not to make him responsible in the one capacity for liabilities incurred in the other. See Minor v. Staples, 71 Me. 316, 36 Am. Rep. 318. Nor does the fact that the plaintiffs had registered, and been assigned a room in the inn, affect the legal status of either party. As to the banquet where the loss occurred, "which was not furnished to the guests of the house, and was not one of the meals provided for them," the plaintiffs' registration and assignment put them in no different position, in a legal sense, than they would have occupied if they had registered and obtained a room elsewhere, or if the defendant had served the banquet at some place separate from and disconnected with his inn. Not having lost their property at the defendant's inn in the character of guests, but in the execution of a purpose distinct from their accommodation as guests, the plaintiffs' actions are not maintainable. Authorities supra.

Other grounds of defense need not be considered. Judgment for the defendant.

III. The Innkeeper's Duty to Receive Guests *

NELSON v. BOLDT et al.

(Circuit Court of United States, E. D. Pennsylvania, 1910. 180 Fed. 779.)

At Law. Action by Osear Battling Matthew Nelson against George C. Boldt and another. On plaintiff's motion for a new trial.

The court charged the jury in part, as follows:

"Innkeepers owe a certain duty to the traveling public which they are required at all times to perform, and, if they violate the duty or refuse to perform it, they are answerable in damages to any person who suffers injury as a result therefrom."

"When a traveler presents himself at an inn, it is the duty of the innkeeper to accommodate him if he be a fit person to be admitted and receive accommodation; it being the innkeeper's duty to receive into his house all strangers and travelers who may call for entertainment, provided he has rooms, and they tender him a reasonable sum for the accommodation demanded. The innkeeper, however, can refuse to admit any one, if he pleases, rendering himself liable in an action for any injury the stranger may sustain. If he refuses to entertain a stranger or a traveler for a good reason, he is not liable for damages, as the law only requires him to entertain fit persons."

"It is also the duty of an innkeeper to protect his guests against the intrusion of boisterous, objectionable characters and persons intoxicated, and such persons may be rejected. Where objection to admitting a guest is based on the fact that the guest is committing a breach of the peace, or is intoxicated, the innkeeper's justification may be determined by the court as a matter of law, but when the question is as to the guest's character or reputation, and his standing as a reputable person, the question is for the jury; that if the jury believed that plaintiff was not a law-abiding citizen, but at the time was engaged in a business which was in violation of the laws of the various states of the United States, then the jury would be authorized in finding that he was not such a proper person as was entitled to enforce a legal right to be admitted to a hotel in the state of Pennsylvania, and defendants would be justified in refusing to give him such accommodations as he demanded at that time, it being no answer that other hotels would accommodate him."

The evidence reviewed by the court to the jury indicated that plaintiff, while claiming to be engaged in athletics and looking after real estate, had in fact represented himself in his own biography as the champion light-weight prize fighter of the world up to February 22,

* For discussion of principles, see Dobie, Bailm. & Carr. § 94.

1910. It also appeared that he had engaged in nearly a hundred hotly-contested battles which were such as to be prohibited by the laws of the state of Pennsylvania and of other states, by which such contests are made a criminal offense. The court thereupon charged that it was for the jury to say whether a violator of the criminal laws of the various states, such as the evidence showed plaintiff was, would be a reputable person to be admitted to a hotel in Pennsylvania under the law as previously stated, and that, if the jury conclude that he was not, he could not recover.

HOLLAND,[7] District Judge. This was a suit instituted by the plaintiff against the defendants, owners and managers of the Bellevue-Stratford Hotel in Philadelphia, to recover damages for having been refused lodging and accommodation at the hotel. * * *

The only other questions raised by the assignments of error are to the charge of the court as to the right of all persons to be admitted to a hotel. We still think the view of the court taken at the trial and expressed in the charge to the jury is a correct exposition of the law.

The motion and reasons for a new trial are overruled.

IV. The Innkeeper's Duty to Care for the Safety of the Guest[8]

WEEKS v. McNULTY et al.

(Supreme Court of Tennessee, 1898. 101 Tenn. 495, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693.)

MCALISTER, J.[9] * * * The facts necessary to be stated are that the defendant Frank McNulty was the owner and proprietor of a public inn in the city of Knoxville, known as "Hotel Knox." Plaintiff's intestate, Arthur Weeks, was a traveling man, representing the Rochester Stamping Works and the Robinson Cutlery Company, of Rochester, N. Y. On the evening of April 7, 1897, said Weeks reached the city of Knoxville, registered at the Hotel Knox, and was assigned to room 49 on the third floor. About 3 o'clock in the morning following, Hotel Knox was destroyed by fire, and said Weeks perished in the flames. The fire was first discovered by the night watchman of the hotel, who immediately gave the alarm, ascended the stairway leading to the second and third floors, knocked upon the doors, and made every effort to arouse the guests. It is in proof that the guests were all aroused and escaped, excepting deceased and one other.

[7] Parts of the opinion are omitted.

[8] For discussion of principles, see Doble, Bailm. & Carr. § 95.

[9] Parts of the opinion are omitted.

It is in evidence that one of the guests, as he passed out, heard some one in 49 pounding at the door, and noticed that he had kicked out one of the panels. If this evidence is to be credited, it tends to show that deceased heard the alarm, but had unfortunately fastened himself in, or, in the excitement, had lost all command of his faculties. It is also shown that parties occupying rooms on the same floor with deceased, immediately contiguous, and across the hall in opposite and diagonal directions, all received the alarm, and succeeded in making their escape. The building was provided with a front and rear stairway, but had no fire escapes. South of the Hotel Knox, and immediately adjoining, was the banking house of the Third National Bank, which being only one story in height, several of the guests leaped upon its roof from the burning hotel building. This mode of escape was accessible to deceased, since his window overlooked the roof, but it is not shown he had knowledge of it.

The general rule of law governing the liability of an innkeeper is that he is not an insurer of the person of his guest against injury, but his obligation is merely to exercise reasonable care, that his guest may not be injured by anything happening through the innkeeper's negligence. 11 Am. & Eng. Enc. Law, p. 32. "There is no natural presumption," said this court, "that a fire, the origin of which is unknown, was the result of the want of care of the owner or occupant of the premises. The ancient rule of the common law, which presumed negligence in such cases, was pronounced in the reported cases to be harsh and unreasonable, and was by St. 6 Anne, c. 31, abrogated. The courts of this country, whether regarding the statute of Anne as in force or not, have unanimously held that negligence or misconduct was the gist of the action against one upon whose premises a fire had originated, and that such negligence would not be presumed from mere proof of the loss by fire communicated from the premises of another." Louisville & N. R. Co. v. Manchester Mills, 88 Tenn. 659, 14 S. W. 314. It must be shown that the negligence of the innkeeper in this case was the proximate cause of the fire and the consequent injuries. Deming v. Storage Co., 90 Tenn. 353, 17 S. W. 89, 13 L. R. A. 518; Railroad Co. v. Kelly, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902; Cable Co. v. Zopfi, 93 Tenn. 374, 24 S. W. 633. We understand these principles were substantially charged by the circuit judge, and the issues of fact have been resolved by the jury in favor of the defendants. We find material evidence in the record to sustain their findings, and, under the rule, the verdict cannot be disturbed on this assignment. * * *

V. The Innkeeper's Liability for the Goods of the Guest [10]

SIBLEY v. ALDRICH.

(Supreme Judicial Court of New Hampshire, 1856. 33 N. H. 553, 66 Am. Dec. 745.)

This action was case, for damage done to the plaintiff's horse while in the possession and keeping of the defendant as an innkeeper. * * * The horse was kicked by the horse of another traveler, tied in the next stall, and his leg broken. * * * A verdict was taken, by consent, for the plaintiff, to be set aside, or judgment rendered thereon, as the court should order.

PERLEY, C. J.[11] The defendant offered to prove that the damage to the plaintiff's horse was not caused by any actual negligence of himself or his servants. He did not offer to prove that it happened through the negligence or default of the plaintiff, direct or implied; nor by irresistible force, inevitable accident, or by the act of God or the public enemy. The question would seem to be whether, as a general rule, and in all cases, an innkeeper can discharge himself from liability for the loss of his guest's goods by showing that it did not happen by the actual neglect or default of himself or his servants. * * *

Three different rules appear to be laid down on this subject in different authorities.

1. That the innkeeper is prima facie liable for the loss of goods in his charge; but may discharge himself by showing that the goods were not lost by his negligence or default, and this is the ground taken by the defendant in the present case. This view of the law is sustained by Dawson v. Chamney, 5 Ad. & El., N. S., 165, and by Metcalf v. Hess, 14 Ill. 129.

2. That the innkeeper is discharged by showing how the accident happened and that it happened by inevitable accident or irresistible force, though the accident might not amount to what the law denominates the act of God, and the force might not be the power of a public enemy. This rule is countenanced by Merritt v. Claghorn, 23 Vt. 177, and Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416.

3. That the innkeeper is liable, unless the loss was caused by the act of God or the public enemy, or by the fault, direct or implied, of the guest. This rule is maintained in Burgess v. Clements, 4 Mau.

[10] For discussion of principles, see Dobie, Bailm. & Carr. §§ 96-98. Besides the cases under this heading, see, also, Lusk v. Belote, ante, p. 148; Crapo v. Rockwell, ante, p. 149; Amey v. Winchester, ante, p. 153.

[11] The statement of facts has been shortened, and parts of the opinion omitted.

& Sel. 306; Richmond v. Smith, 8 Barn. & Cress. 9; Farnworth v. Packwood, 1 Stark. 249; Kent v. Shuckard, 2 Barn. & Ad. 803; Armistead v. White, 6 Eng. L. & Eq. 349; Mason v. Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471; Shaw v. Berry, 31 Me. 478, 52 Am. Dec. 628.

Of text-writers, Story, though with hesitation, goes for the first rule. Kent states the third rule strongly, and Metcalf adopts the same, and the civil law places the liability of the innkeeper and the common carrier on the same footing.

It is somewhat singular that on a practical question, which must be as old as the rudiments of the law, there should be found at this day such diversity of opinion and decision. It is probably owing to the obscure way in which the subject is treated in the report of Calye's Case, 8 Co. 32, and the different interpretations which have been put on that case. On the whole, we think that the better rule is the strict one as laid down in the elaborate and very satisfactory case of Shaw v. Berry, supra. The weight of authority is heavily that way, and the policy and analogies of the law lead to the same conclusion.

Judgment on the verdict.

JOHNSON v. CHADBOURN FINANCE CO.

(Supreme Court of Minnesota, 1903. 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571.)

COLLINS, J.[12] The defendant in this action, a corporation, was the proprietor of what was known as the "Hotel Vendome," in the city of Minneapolis. The plaintiff and his wife, residents of Morris, in this state, while on their way to Florida, stopped for a few days at the Vendome, making preparations for their journey. They were undoubtedly transients, and were in this building when a fire occurred, February 7, 1902. They lost a quantity of personal property, such as wearing apparel and personal ornaments, and brought this action to recover the value of the same. There was a general verdict for defendant. * * *

Conceding that the rigorous rule before stated was just and necessary in its day, there never was any reason or foundation for it in cases where the loss was occasioned by an accidental fire, for which the landlord was not responsible, and when no negligence in connection therewith could be attributed to him. In the present case the fire originated upon premises not occupied by the defendant, and over which it had no control, although in the same building. From the record, it does not appear that the fire spread into that part of the building occupied by the defendant through its negligence; and, as before stated, the jury found, in answer to a special question, that the defendant was not negligent in any manner which contributed

[12] Parts of the opinion are omitted.

to the loss. With these conflicting rules in respect to the liability of the proprietor of a hotel or inn, we are justified in stating one to govern this case which is more just and sensible than the common-law doctrine, before referred to; but we are not quite willing to go to the extent that some of the courts have, and absolve the landlord from all liability in case of loss through thefts if he can show that they were unavoidable accidents, or were otherwise committed without fault or negligence on his part. We do not think that the landlord of a public hotel or inn should in every case of loss be held responsible to the same extent as a common carrier, and that under some circumstances they do not stand upon precisely the same footing. Public policy does not require it, nor is such a doctrine reasonable. * * *

All losses of property incurred by guests at a public hotel or inn by fire are prima facie due to the negligence of the proprietor, but he may discharge and relieve himself from liability by showing that the loss happened by an irresistible force or unavoidable accident, such as a fire originating upon premises over which he had no control, without fault or negligence on his part. This doctrine does not infringe upon the common-law rule, which makes him responsible for all thefts from within his house, or unexplained, whether committed by guests, servants, or strangers, upon the general principle that an innkeeper guaranties the good behavior of all who may be under his roof—particularly his servants. The doctrine which we adopt, and which must control this case, is that an action cannot be maintained against a hotel or inn keeper by a guest to recover for property lost by fire which was occasioned by unavoidable casualty or superior force, and without any negligence on the part of the innkeeper or his servants. A landlord is not liable for a loss by fire happening through a cause beyond his control. * * *

METCALF v. HESS.

(Supreme Court of Illinois, 1852. 14 Ill. 129.)

This was an action originally commenced before a justice of the peace, by Metcalf against Hess, for the value of a mare belonging to the former, and which got hung to death in the stable of the latter; Metcalf being at the time a guest of Hess, and the mare being in the possession of Hess, as an innkeeper in the city of Quincy, in the State of Illinois. * * *

TRUMBULL, J.[18] The evidence in this case, under the law as laid down to the jury, would have warranted a verdict either way; consequently, the court committed no error in its refusal to set aside the ver-

[18] Part of the statement of facts is omitted.

dict as contrary to evidence; and the only questions in the case arise upon the instructions.

If innkeepers, like common carriers, assume the responsibility of insurers, and are liable for all losses, except such as happen from inevitable accident, without the intervention of man, or from public enemies, then the law was wrongly given to the jury; but if they are only prima facie responsible for a loss occasioned by the death of an animal while in their possession, then the instructions given were substantially correct.

It is a harsh rule which makes a person in any case responsible for a loss which has occurred without any fault of his, and it can only be justified upon grounds of public policy, and in consideration of the numerous opportunities afforded by the nature of his business, for fraudulent combination and clandestine dealing, to the injury of the owner of the property. The rule ought not to be extended beyond the reason in which it originated. An innkeeper can have no motive to destroy the animal of his guest, and there is not the same reason for holding him responsible at all events for such a loss, as there would be a common carrier, or even an innkeeper for the loss of goods which had disappeared from his possession; because in the latter case, he may have converted the goods to his own use, while in the former, he could gain nothing by the death of the animal. Accordingly, a distinction is made in the law books between the liability of innkeepers and common carriers, particularly for losses occasioned by the death of animals. Hill v. Owen, 5 Blackf. (Ind.) 323, 35 Am. Dec. 124.

It is laid down in Calye's Case, Coke's Rep. part 8, 33: "That the innholder shall not be charged unless there be default in him or his servants, in the well and safe keeping and custody of their guest's goods and chattels within his common inn." Laws 1861, p. 133; Johnson v. Richardson, 17 Ill. 304, and note, 63 Am. Dec. 369.

This is a leading case upon the liability of innkeepers, and, although there is apparently some conflict in the authorities, yet, Story in his Commentaries on Bailments, § 472, states the law on this subject as follows: "Innkeepers are not responsible to the same extent as common carriers. The loss of the goods of a guest while at an inn, will be presumptive evidence of negligence on the part of the innkeeper or of his domestics. But he may, if he can, repel this presumption, by showing that there has been no negligence whatsoever; or that the loss is attributable to the personal negligence of the guest himself; or that it has been occasioned by inevitable accident, or by superior force."

The cases of Burgess v. Clements, 4 M. & S. 306, and of Dawson v. Chamney, 5 Adolphus & Ellis, 165, fully sustain the law as laid down by Story.

The authorities all agree that an innkeeper is bound to look to the safe keeping of every person's goods who comes to his inn as a guest,

and that in case of loss, negligence is to be imputed to him, unless it affirmatively appear that the loss is not attributable to any fault or want of care by him or his servants.

In cases where the loss is occasioned by the death of an animal, the requirements of public policy are fully answered by holding the innkeeper prima facie liable for the loss, leaving him to exonerate himself, if he can, by showing that the death was in no manner occasioned by a want of proper care and attention on his part.

In this case, the evidence was such as to warrant the jury in finding that the mare came to her death by disease, or from her own viciousness, without any fault on the part of the innkeeper in taking care of her; and under such circumstances, he ought not to be held liable, and such was, in substance, the law as given to the jury. Judgment affirmed.

LANIER v. YOUNGBLOOD.

(Supreme Court of Alabama, 1883. 73 Ala. 587.)

SOMERVILLE, J.[14] The plaintiff in the present action seeks to charge the defendant, Lanier, as keeper of the Exchange Hotel, in the city of Montgomery, for the loss of about sixty dollars in money, a watch and chain, and other articles of jewelry of small value, worn about his person, which are shown to have been stolen during the night, from a room in the hotel occupied by the plaintiff, who was a transient guest or customer. * * *

The question of most importance in this case arises under the construction of sections 1549–1551 of the Code, which prescribe the manner in which hotel and inn keepers in cities may exempt themselves from liability for the loss or abstraction of "any money, jewelry, watches, plate or other things made of gold or silver, or of rare and precious stones, or for other valuable articles of such description as may be contained in small compass." Code 1876, § 1550. This condition is specified to be, that every such inn or hotel keeper "must provide himself with an iron chest, or other safe depository for valuable articles belonging to his guests or customers, and must keep posted on his door, and other public places in his house of entertainment, written or printed notices to his guests or customers, that they must leave their valuables with the landlord, his agent or clerk, for safe-keeping, that he may make safe deposit of the same in the place provided for that purpose." Code, § 1549. It is further provided that any hotel or inn keeper, "who shall refuse or neglect to comply" with these requirements, shall not be entitled to the exemptions and benefits of the statute, but "shall, in all respects, be liable as provided by present law." Code, § 1551.

[14] The statement of facts and parts of the opinion have been omitted.

It is not contended, or shown, that the appellant has literally complied with the requirements of the foregoing statute. It is made satisfactorily to appear that he has failed to do so, by neglecting to post the requisite written or printed notice on the door of the very room in which the plaintiff was assigned lodgings, and from which the goods and money were abstracted. The statute, being in derogation of the common law, must be strictly construed, and can not be extended in its operation and effect by doubtful implication. It clearly must be construed to mean that the notices in question should be posted on all the doors of rooms occupied by guests, and this would include the door of the room in which the plaintiff was lodged. Its purpose is constructive notice, which conclusively imputes knowledge to the guest, when there has been an exact compliance with the requirements of the statute, but not otherwise. Beale v. Posey, supra [72 Ala. 323].

It is urged, however, that the plaintiff had actual notice of the facts intended to be imparted by the written or printed notice which was omitted to be posted upon the door of his room, and that this was sufficient, and must be taken to be a substitute for the constructive or statutory notice required. This was the view taken by the Court of Appeals of New York in Purvis v. Coleman, 21 N. Y. 111. It was shown in that case that, while no notice was posted on the door of the room assigned to the plaintiff as required by the New York statute, yet that full notice in fact was given to him at the time of his arrival at the hotel, and of the occupancy of his room. It was held by five out of the eight judges who sat, that the actual notice proved to have been given the guest was "far more satisfactory and ample than the constructive one required by the statute," and that the object and purpose of the statute had been "more than complied with." Three of the judges, however, including Chief Justice Comstock, dissented from this construction, as adopted by a majority of the court.

If we were to admit the soundness of the principle declared in that case, we are of the opinion, nevertheless, that the plaintiff has not been brought within its influence. The actual notice, which the plaintiff is shown to have had, was acquired by his having observed and read the contents of printed notices in other rooms of the defendant's hotel, at some time within the twelve months previous to the loss of his goods for which the present action was instituted. It may be that the knowledge thus imputed may have lapsed from his memory, or that the absence of the required notice from the door may have induced the belief, that the defendant had ceased his compliance with the statute. The posting of a printed or written notice upon the door of the guest's room may often subserve a more useful office than that of constructive or even actual notice. It may answer as a constant reminder of his obligation to make the requisite deposit of his money and valuables, pointing like a finger-board, always observable, to his statutory duty. It may be an ocular warning, without intermission.

We need not, however, express at this time our disapproval of the

case of Purvis v. Coleman, supra, to which we have above adverted. It answers every purpose to hold that the present case does not fall within its influence. The sounder reasoning, perhaps, is, that the statute prescribes the exact manner in which the common law liability may be escaped, and being in derogation of the common law rule, it must be strictly construed; and a strict construction excludes actual notice by failing to expressly provide for it. This view is adopted in Batterson v. Vogel, 8 Mo. App. 24, and seems to be sustained by the general current of decisions, at least so far as the reasoning of the adjudged cases extends. Porter v. Gilkey, 57 Mo. 235; Beale v. Posey, supra; Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655; Ramaley v. Leland, 43 N. Y. 539, 3 Am. Rep. 728; Clute v. Wiggins, 7 Am. Dec. 457, note. * * *

VI. The Innkeeper's Lien [15]

ROBINS & CO. v. GRAY.

(Court of Appeal, 1895. 2 Q. B. Div. 501.)

* * * The plaintiffs were a firm of dealers in sewing-machines and other articles. In 1894 they had in their employment as a commercial traveller one Green, who canvassed for orders and sold their goods upon commission. In April, 1894, Green, for the purposes of his business as such commercial traveller, went to stay at the defendant's hotel, taking with him sewing-machines, the property of his employers, for the purpose of selling them to customers in the neighborhood. He remained there until the end of July. Whilst there the plaintiffs sent to him from time to time more sewing-machines for the same purpose. At the end of July, Green left the hotel without paying his bill for board and lodging, and he left there some of the machines so sent. Before the defendant received into his hotel the machines so sent, and before Green had incurred his debt for board and lodging, the defendant had been expressly told by the plaintiffs that the machines were their property, and not the property of Green; but he received the goods into his hotel as Green's baggage. The defendant claimed a lien for the amount of Green's debt upon the machines left by him at the hotel. * * *

Lord ESHER, M. R.[16] I have no doubt about this case. I protest against being asked, upon some new discovery as to the law of

[15] For discussion of principles, see Dobie, Bailm. & Carr. §§ 100–102.

[16] Part of the statement of facts and the complete opinions of Kay, L. J., and Smith, L. J., have been omitted.

innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries. The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract, but upon the custom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon that, and that alone; they do not come under any other head of law. What is the liability of an innkeeper in this respect? If a traveller comes to an inn with goods which are his luggage—I do not say his personal luggage, but his luggage—the innkeeper by the law of the land is bound to take him and his luggage in. The innkeeper cannot discriminate and say that he will take in the traveller but not his luggage. If the traveller brought something exceptional which is not luggage—such as a tiger or a package of dynamite—the innkeeper might refuse to take it in; but the custom of the realm is that, unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveller and his goods. He has not to inquire whether the goods are the property of the person who brings them or of some other person. If he does so inquire, the traveller may refuse to tell him, and may say, "What business is that of yours? I bring the goods here as my luggage, and I insist upon your taking them in;" and then the innkeeper is bound by law to take them in.

Again, suppose the things brought are such things as the innkeeper is not bound to take in, he may, as I have said, refuse to take them in although the traveller demands that they shall be taken in as his luggage; but if after that the innkeeper changes his mind and does take them in, then they are in the same position as goods properly offered to the innkeeper according to the custom of the realm. Then the innkeeper's liability is not that of a bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is concerned, if they are stolen by burglars, or by the servants of the inn, or by another guest; he is liable for not keeping them safely unless they are lost by the fault of the traveller himself. That is a tremendous liability: it is a liability fixed upon the innkeeper by the fact that he has taken the goods in; and by law he has a lien upon them for the expense of keeping them as well as for the cost of the food and entertainment of the traveller. By law that lien can be inforced, not only against the person who has brought the goods into the inn, but against the real and true owner of them. That has been the law for two or three hundred years; but to-day some expressions used by judges, and some questions—immaterial, as it seems to me—which have been left to juries, are relied on to establish that if the innkeeper knows that the goods are not the goods of the person who brings them to the inn, he may refuse to take them in; or, if he does take them in, he has no lien upon them. One cannot help asking, What is his liability supposed to be if he does take in goods under such circumstances? It must be borne in mind that goods brought into an

inn are not exclusively in the possession of the innkeeper; the person who brings them may deal with them: he may take them out of a box in a room or passage without the knowledge of the innkeeper, though the latter is bound to see that no one else interferes with them.

Now, is there any decided case in which it has been held that, although goods have been brought to an inn as the luggage of the traveller and received as such by the innkeeper, he has no lien upon them if he knows that they are not the goods of the traveller? There is not one such case to be found in the books. It was said that Broadwood v. Granara, 10 Ex. 417, was such a case. But there the proposition, that if a guest brings goods into an inn as his luggage they must be treated as if they were his goods, was fully recognized. The judges held in that case that a piano, not brought to the inn by the guest as his luggage, but sent in by a tradesman for the guest to play upon during his stay at the inn, was not offered to, nor taken possession of by, the innkeeper under the custom of the realm as the luggage of the guest, and therefore that the piano was not subject to the innkeeper's lien. Whether we should have agreed with that decision is immaterial. The case was expressly decided on the ground that the law of innkeepers did not apply. It is, therefore, no authority in the case now before us, where, as the learned judge in the court below has found, the goods were brought to the inn as the goods of the traveller and accepted as his goods by the innkeeper.

If we were to accede to the argument for the appellants we should be making a new law, and our decision would produce in very many cases great confusion and hardship. I am of opinion that an innkeeper is bound to take in goods with which a person who comes to the inn is travelling as his goods, unless they are of an exceptional character; that the innkeeper's lien attaches, and that the question of whose property the goods are, or of the innkeeper's knowledge as to whose property they are, is immaterial. This appeal should, therefore, be dismissed. * * *

COOK v. KANE et al.

(Supreme Court of Oregon, 1886. 13 Or. 482, 11 Pac. 226, 57 Am. Rep. 28.)

LORD, J.[17] This suit was instituted by the plaintiff, as an innkeeper, to enforce a lien against a piano, put in his possession by the defendant, as his guest, for a debt due for lodging and entertainment. By the facts stipulated, it is admitted that the relation of innkeeper and guest existed between the plaintiff and defendant when the plaintiff, at the request of the defendant, paid the freight charges on the piano, and took it into his custody; that the piano was in fact the

[17] Parts of the opinion of Lord, J., and parts of the dissenting opinion of Thayer, J., are omitted.

property of a third person, who had consigned it to the defendant to sell on commission; but that the plaintiff did not know it was the property of such third person, but received it in his character as an innkeeper, and as the property of his guest.

Upon this state of facts we are to inquire whether the piano is chargeable with an innkeeper's lien for board and lodging furnished his guest. * * *

THAYER, J. (dissenting). * * * Upon the main question in the case there is some doubt, in view of the authorities, upon the subject, though, upon a common-sense view, there would not seem to be any. That the man Kane could pledge the appellant's piano for his own hotel bill, or in any way subject it to the payment thereof, would shock all sense of property right. The respondent's counsel, however, have cited numerous cases where such a lien has attached to the property of a third person, and I have no doubt but that such lien will, in many cases, attach to the property taken by the guest to the inn at which he obtains accommodations, though he be not the owner of it. But in all such cases, it seems to me, the property must derive some special benefit, or else the owner must have intrusted it to a party under circumstances from which he could reasonably have concluded that the party would become the guest of an inn, and take the property with him there as his own; and I do not think the rule should extend further than this.

In the case under consideration it does not appear that the appellant ever knew that Kane was stopping at a hotel. He sent the piano to him at Baker City, to sell upon commission. It does not appear that the respondent furnished the entertainment upon the credit of the piano, or upon the supposition that it belonged to Kane. The latter might, and so far as I can see would, have continued a guest at the hotel the same whether the piano had been sent or not. It is not a case, as I view it, where the owner of the property has clothed another with the indicia of ownership, and a third person been deceived thereby into purchasing it, or giving credit upon the faith of such indication. It was purely a business transaction. The appellant was attempting to make sale of his property, and sent it to Kane for that purpose. The latter had no authority in the premises except to exercise the special power conferred, and it does not appear but that the respondent had full knowledge of the facts as the appellant alleged he did in his answer. I am inclined to believe that the burden of proof was upon the respondent to establish that he supposed the piano to belong to Kane, and that he entertained him upon the faith that such was the fact, before he could claim a lien upon it for the hotel bill. The property of one man should not be taken for the debt of another, against the former's consent, unless he has done some act, or neglected some duty, creating the liability. A party cannot be deprived of his ownership to property to satisfy the claim of another unless he has, in some form, obligated himself to submit to it.

from such guests, lodgers, or boarders for their accommodation, board, or lodging, and such other extras as are furnished at their request, and shall have the right to retain in their possession such baggage, property, or other valuables until such charges are fully paid, and to sell such baggage, property, or other valuables for the payment of such charges in the manner provided in the next succeeding section of this chapter." Section 5975, Ballinger's Ann. Codes & St. The appellant argues that under this section the hotel keeper's lien attaches to all property the guest brings into the hotel, regardless of whom the title to the same may rest in, or of the fact that the hotel keeper knows who holds such title, provided the property is in the rightful possession of the guest, and subjected to his care. * * *

Turning to the statute it will be observed that a lien is given to hotel keepers, "upon the baggage, property, or other valuables of their guests." It is not extended to the property of third persons, even though such property be brought into the hotel by the guest and the hotel keeper be ignorant of its true ownership. It may be that, were the property such as a guest ordinarily carries, and the hotel keeper entertained him on the faith of such property in ignorance of its true ownership, that the lien would attach; but this is as far as the rule could extend. There can be no lien under the statute where the hotel keeper knows that the property in possession of the guest is not the guest's property, but is the property of a third person.

The cases generally where like and similar statutes have been construed lay down the foregoing rule. In McClain v. Williams, 11 S. D. 227, 76 N. W. 930, 49 L. R. A. 610, 74 Am. St. Rep. 791, it was held that a statute giving an innkeeper a lien on the property "belonging" to a guest did not give a lien on property in possession of the guest belonging to a third person. The court also held that to give a lien for the board of a guest on a third person's property loaned or leased to the guest would be depriving one of his property without due process of law. On this last question, however, the Supreme Court of Iowa has laid down a different rule. See Brown Shoe Co. v. Hunt, 103 Iowa, 586, 72 N. W. 765, 39 L. R. A. 291, 64 Am. St. Rep. 198. In Torrey & Co. v. McClellan, 17 Tex. Civ. App. 371, 43 S. W. 64, it was held that a statute reading as follows: "Proprietors of hotels and boarding-houses shall have a specific lien upon all property or baggage deposited with them for the amount of the charges against them or their owners, if guests at such hotels and boarding-houses"—did not give a hotel keeper a lien on samples carried by a traveling salesman, belonging to his employer, for the bill of the salesman incurred for board and lodging at the claimant's hotel. In Wyckoff v. Southern Hotel Co., 24 Mo. App. 382, it was held that a statute giving an innkeeper a lien in the "baggage and other valuables of the guest" did not give a lien upon goods of a third person taken to the inn by the guest. The only other case called to our attention involving this question where a statute was construed is Brown

Shoe Co. v. Hunt, supra. It was there held that a statute giving to innkeepers a lien on all property "belonging to or under the control of their guests" was sufficiently broad to include samples brought to a hotel by a traveling salesman, although the innkeeper knew at the time he received the salesman as a guest that the samples did not belong to him, but belonged to his employer; the court holding, as before remarked, that such a statute did not deprive the owner of his property without due process of law. This case, however, is distinguishable from the case at bar and those last above cited in that the statute construed expressly provides for a lien on the property of third persons, while the others do not so provide.

The conclusion reached renders it unnecessary to discuss the other errors assigned. The judgment is affirmed.

PART II

CARRIERS OF GOODS

PRIVATE AND COMMON CARRIERS OF GOODS

I. Private Carriers of Goods[1]

O'ROURKE v. BATES.

(Nassau County Court, New York, 1911. 73 Misc. Rep. 414, 133 N. Y. Supp. 392.)

NIEMANN, J.[2] The plaintiff employed the defendant on the 15th day of December, 1910, to move, with his horse and sleigh, plaintiff's furniture from Lynbrook to Flushing, L. I., at an agreed compensation of $10. Among the goods was a brass bed, which was delivered to the defendant in perfect condition. Upon the arrival of the goods at Flushing, it was discovered that a part of said bed had been broken off and lost in transit. The defendant admitted that he had lost the missing part of the bed.

There are two kinds or classes of carriers, viz., common carriers and private carriers. A common carrier is one who undertakes to transport goods for the general public, and is compelled to do so by law (Allen v. Sackrider, 37 N. Y. 341; Jackson A. I. W. v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432), while a private carrier acts in a particular case for hire or reward (Allen v. Sackrider, supra; Fish v. Clark, 49 N. Y. 122; Jackson A. I. W. v. Hurlbut, supra). A common carrier is regarded by law as an insurer (Fein v. Weir, 129 App. Div. 299, 114 N. Y. Supp. 426; Heyman v. Stryker [Sup.] 116 N. Y. Supp. 638; Gardiner v. N. Y. C. R. R. Co., 139 App. Div. 17, 123 N. Y. Supp. 865; Brewster v. N. Y. C. & H. R. R. R. Co., 145 App. Div. 51, 129 N. Y. Supp. 368), and can only be excused from making delivery of the goods intrusted to him for transportation by showing that the loss or damage was caused by an act of God or the public enemy (Fein v. Weir, supra; Heyman v. Stryker, supra; Brewster v. N. Y. C. & H. R. R. R. Co., supra).

[1] For discussion of principles, see Doble, Bailm. & Carr. § 106.

[2] Part of the opinion is omitted.

It was not shown by the evidence in this case that the defendant was a common carrier; and therefore the question of his liability must be adjudicated under the rules of liability applicable to private carriers as distinguished from common carriers.

The rule of liability in the case of a private carrier is not so stringent as that applicable to a common carrier. He is not an insurer of the goods intrusted to him; but he is required to use care in the discharge of his duty. Pike v. Nash, *40 N. Y. 335. His liability is like that of an ordinary bailee. A private carrier who is paid to carry or move goods is really a bailee for hire. Story, Bailm. (9th Ed.) §§ 370, 421, 422; Schouler, Bailm. & Car. (3d Ed.) §§ 330, 331.

While a bailee for hire is not an insurer of the goods intrusted to him, he is obliged to use ordinary care in the discharge of his duty; and proof of the delivery to him of such goods in good condition and the loss of such goods or the return thereof in a damaged state raises a presumption that the loss or injury was occasioned by his negligence, unless he shows that such loss or damage occurred under conditions over which he had no control. Collins v. Bennett, 46 N. Y. 490; Schwerin v. McKie, 51 N. Y. 180, 10 Am. Rep. 581; Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Snell v. Cornwell, 93 App. Div. 136, 87 N. Y. Supp. 1; Selesky v. Vollmer, 107 App. Div. 300, 85 N. Y. Supp. 130; Nichols v. Balch, 8 Misc. Rep. 452, 28 N. Y. Supp. 667; Waterman v. American Pin Co., 19 Misc. Rep. 638, 44 N. Y. Supp. 410; Campbell v. Muller, 19 Misc. Rep. 189, 43 N. Y. Supp. 233; Lyons v. Thomas, 34 Misc. Rep. 175, 68 N. Y. Supp. 802; Plesser v. Appel (Sup.) 113 N. Y. Supp. 1034.

The burden of proving a bailee's negligence is always on the bailor; but, where the loss or damage is unexplained, the bailee is presumed to have been negligent and the bailor has made out a prima facie case. Burnell v. N. Y. C. R. R. Co., 45 N. Y. 185, 6 Am. Rep. 61; Claflin v. Meyer, supra; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Mayer v. Coe, 31 Misc. Rep. 733, 65 N. Y. Supp. 347.

Tested by the foregoing rules, the record shows a prima facie case of negligence on the part of the defendant which was not rebutted by him; and he was, therefore, properly adjudged to be liable for the loss and damage suffered by the plaintiff. * * *

It follows, therefore, that the judgment should be affirmed, with costs. Judgment affirmed, with costs.

II. Common Carriers of Goods [3]

ALLEN v. SACKRIDER.

(Court of Appeals of New York, 1867. 37 N. Y. 341.)

PARKER, J. The action was brought against the defendants to charge them, as common carriers, with damage to a quantity of grain shipped by the plaintiffs in the sloop of the defendants, to be transported from Trenton, in the province of Canada, to Ogdensburgh, in this state, which accrued from the wetting of the grain in a storm.

The case was referred to a referee, who found as follows: "The plaintiffs in the fall of 1859 were partners, doing a business at Ogdensburgh. The defendants were the owners of the sloop Creole, of which Farnham was master. In the fall of 1859, the plaintiffs applied to the defendants to bring a load of grain from the bay to Quinte to Ogdensburgh. The master stated that he was a stranger to the bay, and did not know whether his sloop had capacity to go there. Being assured by the plaintiffs that she had, he engaged for the trip at three cents per bushel, and performed it with safety. In November, 1859, plaintiffs again applied to defendants to make another similar trip for grain, and it was agreed at $100 for the trip. The vessel proceeded to the bay, took in a load of grain, and on her return was driven on shore, and the cargo injured to the amount of $1,346.34; that the injury did not result from the want of ordinary care, skill or foresight, nor was it the result of inevitable accident or what in law is termed the act of God. From these facts my conclusions of law are that the defendants were special carriers, and only liable as such, and not as common carriers, and that the proof does not establish such facts as would make the defendants liable as special carriers; and therefore the plaintiffs have no cause of action against them."

The only question in the case is, were the defendants common carriers? The facts found by the referee do not I think make the defendants common carriers. They owned a sloop; but it does not appear that it was ever offered to the public or to individuals for use, or ever put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had ever offered their services as such. This casual use of the sloop in transporting plaintiffs' property falls short of proof sufficient to show them common carriers.

[3] For discussion of principles, see Doble, Bailm. & Carr. § 107.

A common carrier was defined, in Gisbourn v. Hurst, 1 Salk. 249, to be, "any man undertaking, for hire, to carry the goods *of all persons indifferently;*" and in Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133, to be "one who undertakes, for hire, to transport the goods of *such as choose to employ him,* from place to place." In Orange Bank v. Brown, 3 Wend. (N. Y.) 161, Chief Justice Savage said: "Every person who undertakes to carry, for a compensation, the *goods of all persons indifferently,* is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out *in common,* that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire." Story on Contracts, § 752 a. The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. "On the whole," says Professor Parsons, "it seems to be clear that no one can be considered as a common carrier unless he has, in some way, held himself out to the public as a carrier, in such manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him." 2 Pars. on Cont. (5th Ed.) 166, note.

The learned counsel for the appellant in effect recognizes the necessity of the carrier holding himself out to the world as such, in order to invest him with the character and responsibilities of a common carrier; and, to meet that necessity, says: "The 'Creole' was a freight vessel, rigged and manned suitably for carrying freight from port to port; her appearance in the harbor of Ogdensburgh, waiting for business, was an emphatic advertisement that she sought employment." These facts do not appear in the findings of the referee, and, therefore, cannot, if they existed, help the appellants upon this appeal.

It is not claimed that the defendants are liable, unless as common carriers. Very clearly they were not common carriers; and the judgment should, therefore, be affirmed.

ARKADELPHIA MILLING CO. et al. v. SMOKER MERCHANDISE CO. et al.

(Supreme Court of Arkansas, 1911. 100 Ark. 37, 139 S. W. 680.)

FRAUENTHAL, J.[4] * * * The Arkadelphia Milling Company was engaged in the business of transporting goods at the city of Arkadelphia, and this portion of its business was known as and called the Arkadelphia Transfer Company, and will be referred to by that name. It owned a number of transfer wagons, and was en-

[4] Parts of the opinion are omitted.

gaged in hauling for hire goods and merchandise from the depot to the merchants in said city, whose places of business were situated some distance from the depot, and also in hauling goods from these places of business to the depot, as well as from place to place in the city. It was engaged regularly in conveying goods as a business, and not occasionally between said places. It held itself out to the public to transport goods in this way indiscriminately, and undertook for hire, and was under obligation, to carry goods for all persons who chose to employ it. According to the testimony of the manager of the transfer company, it represented and was the agent of the merchants in Arkadelphia for the purpose of receiving from the railroad company goods which were consigned to them, and it then carried same to their various places of business. In this way it represented upon this occasion the plaintiffs, as well as the other merchants, relative to this shipment.

According to the custom and usage of the trade at that place, the manager of the transfer company would go each morning to the depot and inquire if any shipment had arrived; and, upon learning that shipments had arrived, he would, upon securing proper release of the goods, transport same to the merchants. * * *

2. The liability of the Arkadelphia Milling Company to the plaintiffs depends upon its relation to them and the character of the business in which it was engaged; that is, whether it was a common carrier, and incurred the liability as such by the undertaking it assumed. In order to constitute one a common carrier, the mode of transporting the goods which he employs is immaterial. Persons who engage in the business of transporting goods from place to place in a city, in drays or transfer wagons, may be common carriers. In the case of Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393, it is said: "A common carrier is one who undertakes to transport, from place to place, for hire, the goods of such persons as think fit to employ him. Such is the proprietor of wagons, barges, lighters, merchant ships, or other instruments for public conveyance of goods."

In Story on Bailments, § 495, it is said: "To bring a person under the description of common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation pro hac vice."

In the case of Robertson & Co. v. Kennedy, 2 Dana (Ky.) 430, 26 Am. Dec. 466, it is said: "One who undertakes for hire or reward to transport goods of all such as choose to employ him, from place to place, is a common carrier, and this includes draymen and cartmen who undertake as a common employment to carry goods from place to place for hire. The mode of transportation is immaterial." Angell on Carriers, § 870: 1 Hutchinson on Carriers,

§ 68; Beckman v. Shouse, 5 Rawle (Pa.) 179, 28 Am. Dec. 653; Jones v. Voorhees, 10 Ohio, 145; Farley v. Lavary, 107 Ky. 523, 54 S. W. 840, 47 L. R. A. 383; Jackson Iron Works v. Hulbert, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432.

But, in order to constitute one a common carrier, the business as such must be regular and customary in its character, and not casual only. An occasional undertaking to carry goods will not make one a common carrier. But the business of carrying must be conducted as a business, and must be of such a general and public nature that a person carrying it on is bound to convey goods of all persons indifferently who offer to pay for the transportation thereof. Where, therefore, one is engaged in the business of carrying goods for others indiscriminately, and undertakes for compensation to transport personal property from one place to another for all persons, and by virtue of the public nature of his business is under an obligation to carry for all alike, and not merely at his own option, then he is a common carrier, and is subject to the extraordinary liability imposed upon common carriers. 1 Hutchinson on Carriers, § 48. And this rule applies alike to draymen and transfer companies who are engaged in hauling goods from one place to another in a city, as it does to carriers by rail or by water.

Under the testimony adduced in this case, we think that the transfer company was engaged in the carrying business as an habitual employment, and that it possessed all the characteristics and came within the description of a common carrier of goods. * * *

BUCKLAND v. ADAMS EXPRESS CO.

(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 124, 93 Am. Dec. 68.)

Contract to recover the value of a case of pistols. In the superior court judgment was entered for the plaintiffs on agreed facts; and the defendants appealed to this court. * * *

BIGELOW, C. J.[5] We are unable to see any valid reason for the suggestion that the defendants are not to be regarded as common carriers. The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they

[5] Parts of the statement of facts and opinion are omitted.

take property from the custody of the owner, assume entire possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it. The statement embraces all the elements essential to constitute the relation of common carriers on the part of the defendants towards the persons who employ them. Dwight v. Brewster, 1 Pick. (Mass.) 50, 53, 11 Am. Dec. 133; Lowell Wire Fence Co. v. Sargent, 8 Allen (Mass.) 189; 2 Redfield on Railways, 1–16.

But it is urged in behalf of the defendants that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers over railroads and by steamboats cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them nor subject to their direction or supervision; and that the rules of the common law, regulating the duties and liabilities of carriers, having been adapted to a different mode of conducting business, by which the carrier was enabled to select his own servants and vehicles and to exercise a personal care and oversight of them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed, in part, at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination unless the fulfilment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are carried by land or water, by the carrier himself or by agents employed by him. The contract does not imply a personal trust, which can be executed only by the contracting party himself or under his supervision by agents and means of transportation directly and absolutely within his control. Long before the discovery of steam-power, a carrier who undertook to convey merchandise from one point to another was authorized to perform the service through agents exercising an independent employment, which they carried on by the use of their own vehicles and under the exclusive care of their own servants. It certainly never was supposed that a person who agreed to carry goods

from one place to another by means of wagons or stages could escape liability for the safe carriage of the property over any part of the designated route by showing that a loss happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not select or control. The truth is that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him. And there is no good reason for making any distinction in the nature and extent of this liability attaching to carriers, as between those who undertake to transport property by the use of the modern methods of conveyance, and those who performed a like service in the modes formerly in use. If a person assumes to do the business of a common carrier, he can, if he sees fit, confine it within such limits that it may be done under his personal care and supervision or by agents whom he can select and control. But if he undertakes to extend it further, he must either restrict his liability by a special contract or bear the responsibility which the law affixes to the species of contract into which he voluntarily enters. There is certainly no hardship in this, because he is bound to take no greater risk than that which is imposed by law on those whom he employs as his agents to fulfil the contracts into which he has entered. * * * Judgment for the plaintiffs.

THE NEAFFIE.

(Circuit Court of United States, D. Louisiana, 1870. 1 Abb. 465, Fed. Cas. No. 10,063.)

WOODS, Circuit Judge.[6] The case was this: On May 28, 1866, the steam tug Neaffie undertook to tow a flat or barge laden with hay from Jefferson City to the flatboat wharf in the city of New Orleans—a distance of three or four miles. She made fast to the flat and towed her down the stream to said wharf, the master and crew of the flat remaining aboard of her. As she was about landing the flat, the latter collided with another flat made fast to the wharf. In a short time after the collision, the flat towed by the Neaffie sunk. * * * No witness speaks of any act done or omitted showing want of skill or care on the part of the Neaffie.

Under this state of facts the Neaffie cannot be held liable for the damage suffered by the flat and cargo, unless she is made responsible as a common carrier. The business of the Neaffie, as the evidence shows, is to tow flats and other water craft from one point to another in and about the harbor of the city of New Orleans. The hire for her

[6] Parts of the opinion are omitted.

services varies according to the bargain made at the time the service is rendered.

A common carrier is often defined to be: "One who undertakes for hire to transport the goods of such as choose to employ him from point to point." This definition is very broad, and in its application to facts is subject to certain limitations. A better and more precise definition is, "One who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage." Was the Neaffie a common carrier under either of these definitions?

Chief Justice Marshall, in Boyce v. Anderson, 2 Pet. 150, 7 L. Ed. 379, says: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further or applied to new cases." So unless the case of steam-tugs towing boats and their cargoes can be brought strictly within the definition of common carriers, I am not disposed to apply to them the great rigor of the law applicable to common carriers. Can it be said that the tug-boats plying in the harbor of New Orleans undertake to transport the goods found on the water-craft which they take in tow? It appears to me that it is the boat in which the goods are put that undertakes to transport them. The tug only furnishes the motive-power. It is like the case of the owner of a wagon laden with merchandise hiring another to hitch his horses to the wagon to draw it from one point to another, the owner of the wagon riding in it, and having charge of the goods. In such a case, could it be claimed with any show of reason that the owner of the team was a common carrier? The reason of the law which imposes upon the common carrier such rigorous responsibility fails in such a case. The tug-boats plying in New Orleans harbor do not receive the property into their custody, nor do they exercise any control over it other than such as results from the towing of the boat in which it is laden. They neither employ the master and hands of the boat towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The boat, goods, and other property remain in charge and care of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the master or crew of the tow-boat, it can be hardly contended they would be answerable, and yet carriers would be answerable for such loss.

That tow-boats are not common carriers has been held in the following cases: Caton v. Rumney, 13 Wend. (N. Y.) 387; Alexander v. Greene, 3 Hill (N. Y.) 9; Wells v. Steam Navigation Co., 2 N. Y. 204; Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; Leonard v. Hendrickson, 18 Pa. 40, 55 Am. Dec. 587. * * *

Holding, then, that the Neaffie was not a common carrier, and that

she was bound only for ordinary diligence and care, and that the testimony shows such diligence and care on the part of the master of the Neaffie, it follows that the libel must be dismissed at the costs of the libelant.

COUP v. WABASH, ST. L. & P. RY. CO.

(Supreme Court of Michigan, 1885. 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374.)

CAMPBELL, J.[1] * * * Plaintiff had a large circus property, including horses, wild animals, and various paraphernalia, with tents and appliances for exhibition. He owned special cars, fitted up for the carriage of performers and property, in which the whole concern was moved from place to place for exhibition.

The defendant company has an organized connection, under the same name, with railways running between Detroit and St. Louis, through Indiana and Illinois. On the twenty-fifth of July, 1882, a written contract was made at St. Louis by defendant's proper agent, with plaintiff, to the following effect: Defendant was to furnish men and motive power to transport the circus by train of one or more divisions, consisting of twelve flat, six stock, one elephant, one baggage, and three passenger coaches, being in all 23 cars, from Cairo to Detroit with privilege of stopping for exhibition at three places named, fixing the time of starting from each place of exhibition. * * * Unless this undertaking was one entered into by the defendant as a common carrier, there is very little room for controversy. The price was shown to be only 10 per cent. of the rates charged for carriage, and the whole arrangement was peculiar. If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may extend. In our view it was in no sense a common carrier's contract if it involved any principle of the law of carriers at all. The business of common carriage, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier and running on their own time. It is never the duty of a carrier, as such, to make up special trains on demand, or to drive such trains made up entirely by other persons or by their cars.

It is not important now to consider how far, except as to owners of goods in the cars forwarded, the reception of cars, loaded or unloaded, involves the responsibility of carriers, as to the owners of the cars, as such. The duty to receive cars of other persons, when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent on companies, in their duty as common carriers, to move such cars except in their own routine. They are not obliged to accept and run them at all times and seasons, and not

[1] Parts of the opinion are omitted.

in the ordinary course of business. The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars which belonged to plaintiff, and which the defendant neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents, defendant had no power to meddle. The cars contained horses which were entirely under control of plaintiff, and which, under any circumstances, may involve special risks. They contained an elephant, which might very easily involve difficulty, especially in case of accident. They contained wild animals, which defendant's men could not handle, and which might also become troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage. The trains were not to be run at the option of the defendant, but had short routes and special stoppages, and were to be run on some part of the road chiefly during the night. They were to wait over for exhibitions, and the times were fixed with reference to these exhibitions, and not to suit the defendant's convenience. There was also a divided authority, so that, while defendant's men were to attend to the moving of the trains, they had nothing to do with loading and unloading cars, and had no right of access or regulation in the cars themselves.

It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions; and if he could not, then he could only do so on such terms as defendant saw fit to accept. It was perfectly legal and proper, for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages, to stipulate for exemption from responsibility for consequences which might follow from carelessness of their servants while in this special employment. How far, in the absence of contract, they would be liable in such a mixed employment, where plaintiff's men, as well as their own, had duties to perform connected with the movement and arrangement of the business, we need not consider. It is a misnomer to speak of such an arrangement as an agreement for carriage at all. It is substantially similar to the business of towing vessels, which had never been treated as carriage. It is, although on a larger scale, analogous to the business of furnishing horses and drivers to private carriages. Whatever may be the liability to third persons who are injured by carriages or trains, the carriage owner cannot hold the persons he employs to draw his vehicles as carriers. We had before us a case somewhat resembling this in more or less of its features in Mann v. White River Log & Booming Co., 46 Mich. 38, 8 N. W. 550, 41 Am. Rep. 141, where it was sought to make a carrier's liability attach to log-driving, which we held was not permissible. All of these special undertakings have peculiar features of their own, but they cannot be brought within the range of common carriage. * * *

THE LIABILITIES OF THE COMMON CARRIER OF GOODS

I. Discrimination in the Carrier's Service [1]

CHICAGO & N. W. RY. CO. v. PEOPLE ex rel. HEMPSTEAD.

(Supreme Court of Illinois, 1870. 56 Ill. 365, 8 Am. Rep. 690.)

LAWRENCE, C. J.[2] This was an application for a mandamus, on the relation of the owners of the Illinois River elevator, a grain warehouse in the city of Chicago, against the Chicago & Northwestern Railroad Company. The relators seek by the writ to compel the railway company to deliver to said elevator whatever grain in bulk may be consigned to it upon the line of its road. * * *

Since the 10th of August, 1866, the Chicago & Northwestern Company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators known as the "Galena," "Northwestern," "Munn & Scott," "Union," "City," "Munger & Armor," and "Wheeler," has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company, adopted in 1864, forbidding the carriage of grain in bulk if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force. * * *

It is admitted by respondent's counsel, that railway companies are common carriers, though even that admission is somewhat grudgingly made. Regarded merely as a common carrier at common law, and independently of any obligations imposed by the acceptance of its charter, it would owe important duties to the public, from which it could not release itself, except with the consent of every person who might call upon it to perform them. Among these duties, as well defined and settled as anything in the law, was the obligation to receive and carry goods for all persons alike, without injurious discrimination as to terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy. These obligations grew out of the relation voluntarily assumed by the carrier toward the public, and the require-

[1] For discussion of principles, see Doble, Bailm. & Carr. §§ 109, 111, 115.

[2] Parts of the opinion are omitted.

ments of public policy, and so important have they been deemed, that eminent judges have often expressed their regret that common carriers have ever been permitted to vary their common law liability, even by a special contract with the owner of the goods.

Regarded, then, merely as a common carrier at common law, the respondent should not be permitted to say it will deliver goods at the warehouse of A. and B., but will not deliver at the warehouse of C., the latter presenting equal facilities for the discharge of freight, and being accessible on respondent's line.

But railway companies may well be regarded as under a higher obligation, if that were possible, than that imposed by the common law, to discharge their duties to the public as common carriers fairly and impartially. As has been said by other courts, the State has endowed them with something of its own sovereignty, in giving them the right of eminent domain. By virtue of this power, they take the lands of the citizen against his will and can, if need be, demolish his house. Is it supposed these great powers were granted merely for the private gain of the corporators? On the contrary, we all know the companies were created for the public good.

The object of the legislature was to add to the means of travel and commerce. If, then, a common carrier at common law came under obligations to the public from which he could not discharge himself at his own volition, still less should a railway company be permitted to do so, when it was created for the public benefit and has received from the public such extraordinary privileges. Railway charters not only give a perpetual existence and great power, but they have been constantly recognized by the courts of this country as contracts between the companies and the State, imposing reciprocal obligations.

The courts have always been, and we trust always will be, ready to protect these companies in their chartered rights, but, on the other hand, we should be equally ready to insist that they perform faithfully to the public those duties which were the object of their chartered powers. * * *

The contract in question is peculiarly objectionable in its character and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the State might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the State almost wholly to their control, as a means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone and thus give to the owner of such elevator an absolute and complete monopoly in the handling of all the grain that might be transported over such road. So, too,

at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the State, and, by the sacredness of such charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such a system would be the cause, when fully developed and managed by unscrupulous hands.

Can it be seriously doubted whether a contract, involving such a principle, and such results, is in conflict with the duties which the company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouse the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the policy of delivering grain exclusively, at its chosen warehouses, is a deliberate policy, to be followed for a term of years, during which these contracts run. * * *

The principle that a railroad company can make no injurious or arbitrary discrimination between individuals in its dealings with the public, not only commends itself to our reason and sense of justice, but is sustained by adjudged cases. * * *

It is insisted by counsel for the respondent that, even if the relators have just cause of complaint, they cannot resort to the writ of mandamus. We are of opinion, however, that they can have an adequate remedy in no other way, and that the writ will therefore lie. * * *

ST. LOUIS SOUTHWESTERN RY. CO. v. CLAY COUNTY GIN CO.

(Supreme Court of Arkansas, 1906. 77 Ark. 357, 92 S. W. 531.)

Action by the Clay Gin Company against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, defendant appeals.

On the 3d day of August, 1903, the appellee instituted this action against the appellant, and alleged it was a railway corporation operating a line as a common carrier in Missouri and Arkansas, and the appellee was in the months of October, November, and December, 1902, engaged in shipping cotton seed from the town of Rector, in Clay county, Ark., to a customer at Cairo, Ill., and that during said months it had for shipment 65 tons of seed of the market value of $16 per ton, which were to be shipped over appellant's line, and

it made demand through appellant's agents at Rector for cars to ship said seed, and the appellant negligently failed and refused to provide transportation for the same, and that by reason of said failure said seed rotted, whereby appellee was damaged in the sum of $850. * * *

On behalf of appellant, the proof showed that during the months of October and November there was a shortage in cars, brought about by an unforeseen and extraordinary accumulation of freight, and by other conditions, which the transportation agent and the chief train dispatcher of appellant explained as follows: A. B. Liggett testified that he was its superintendent of transportation, and had charge of the car service in Missouri and Arkansas. All customers shared alike in a shortage. There was a shortage of cars in the months of October and November. In October, 1902, there was an average daily shortage in Missouri of 104 cars per day, and in Arkansas 175 cars per day. In November they had a daily shortage in Missouri of 224 cars, and in Arkansas of 644 cars. At that time the company had seven cars per mile for each mile of its main line or branches, or about 7,000 cars, which compared favorably with other roads in Arkansas and Missouri. * * * Witness said that during the fall of 1902 the demand for cars was greater than it had ever been before. There were a great many new mills along the line of the road. They anticipated some increase in the business in the summer of 1902 and ordered 1,500 new box cars, and they were loaded and gone before they knew they had them. When they ordered the cars they thought they would be sufficient to handle the business, but they were not. They could not anticipate the congested condition of freight on connecting lines in time to have provided cars. * * *

WOOD, J.[8] (after stating the facts). This was an action under section 6804 of the Digest (Kirby's) for failing to furnish cars. That section, among other things, provides: "It shall be unlawful for any person or corporation engaged alone or associated with others in the transportation of passengers or property by railroad in this state, as freight or express, * * * to make any preference in furnishing cars or motive power. And all persons or corporations engaged as aforesaid, shall furnish, without discrimination or delay, equal and sufficient facilities for the transportation of passengers, the receiving, loading and unloading, storing, carriage and delivery of all property of a like character carried by him, them or it, and shall perform with equal expedition, and at uniform rates the same kind of services connected with the contemporaneous transportation thereof as aforesaid," etc. Section 6808 provides the penalty for a violation of the act.

The statute did not intend to make the duty of carriers to furnish

[8] The statement of facts has been abbreviated.

transportation facilities an absolute one, for it would be unreasonable to conclude that the Legislature intended to impose upon them duties that under certain conditions, could not be anticipated by them, and which would be impossible to perform, and yet, for such nonperformance, to exact of them heavy penalties. The statute under consideration is but declarative of the requirements of the common law as to the duty of furnishing transportation facilities. After declaring what that duty is, it prescribes the penalty for its nonperformance. "A common carrier, for such goods as he undertakes to carry, is bound to provide reasonable facilities of transportation to all shippers, at every station, who in the regular and ordinary course of business offer their goods for transportation. The carrier is not required to provide in advance for any unprecedented and unexpected rush of business, and therefore will be excused for delay in shipping, or even in receiving goods for shipment, until such emergency can in the regular and usual course of business be removed." Railway v. Oppenheimer, 64 Ark. 271, 43 S. W. 150, 44 L. R. A. 353; 4 Elliott on R. R. § 1470; Hutch. on Car. § 292; 6 Cyc. 372, note 2.

To be sure the carrier is liable where he fails entirely to furnish transportation. But the liability of the carrier under the act of March 11, 1899 (Kirby's Digest), is founded, not so much on the inadequacy of the facilities at his command to supply the demands of shippers, as on his refusal or failure to make the facilities which he has available to all who are similarly situated without discrimination or delay. For the act makes it the duty to furnish without discrimination or delay. So, if the carrier by reason of some unforeseen and unusual or unprecedented condition in the traffic is unable to furnish cars for the accommodation of all shippers, he must, in order to escape liability under this statute, furnish such as he has to all shippers without discrimination or delay.

It is conceded that appellant failed to furnish to the shippers of cotton seed at Rector all the transportation needed, but its failure to do this is accounted for in a way to exempt it from liability according to the doctrine above mentioned. So the question, as last, is, did appellant discriminate against the appellee in furnishing what cars it could procure? In Railway v. Oppenheimer, supra, and Railway v. State, 73 Ark. 373, 84 S. W. 502, 92 S. W. 26, it is shown that, to constitute actionable discrimination in the matter of failing to furnish transportation facilities, there must be some undue or unjust preference, something in the facts tending to show that the conduct of the carrier was superinduced by a desire to favor one shipper over another—to give an unjust preference to one over the other, and thereby to attempt to create a monopoly to "pull down one man's business, while building up another's." But if the facts show that "those who are in substantially the same situation with reference to the carrier are treated with the same con-

sideration and accorded the same privileges, there can be no actionable discrimination."

Now here the shippers were in substantially the same situation, and, it seems to us, the uncontradicted facts show that they were given substantially the same facilities for transportation during the cotton season. In September appellee was given five cars, and the Rector Gin Company, a rival shipper, was given six; but in November the appellee received ten cars, while the Rector Gin Company received only seven, and in the month of October appellee and its rival each received seventeen cars. True the proof shows that from the 3d to the 10th of October appellee received only three cars, while its rival received six, but during that entire month they each received the same number. Had appellee received cars from the 3d to the 10th of October to make it equal to the Rector Gin Company, it would have been entitled to only one car more, as there could not be fractional cars. It is, in the very nature of the business, impossible for mathematical precision to be observed in the manner of the distribution of cars to the various shippers at any given station. This necessarily results from the difference in the demands that will be made by different shippers, although they may be in substantially the same situation with reference to the carrier and the commodity to be shipped. The undisputed facts here convince us that there was no such difference as to constitute a discrimination, within the purview of the above statute.

Reversed and remanded for a new trial.

II. The Liability of the Common Carrier for the Loss of, or Damage to, the Goods [4]

MERRITT v. EARLE.

(Court of Appeals of New York, 1864. 29 N. Y. 115, 86 Am. Dec. 292.)

WRIGHT, J.[5] There was no controversy as to the nature of the accident, or how it occurred, which caused the loss of the plaintiff's horses. On the Friday preceding the downward trip of the defendant's steamer, a sloop had been sunk in a squall of wind near Buttermilk Falls, and about in the usual route on the downward passage of steamboats navigating the river. The defendant's steamer ran upon the mast of this sunken vessel which stove in her bottom and she was cast away and sunk in water to her promenade deck in consequence. The defendant assumed this to be an inevitable accident, against which he could not have guarded by the exercise of due

[4] For discussion of principles, see Doble, Bailm. & Carr. §§ 116–118.

[5] The statement of facts, the opinion of Johnson, J., and part of the opinion of Wright, J., are omitted.

diligence and precaution; and as matter of law, that it excused him from liability as a carrier. This presents one of the two questions raised by the exceptions in the case.

The law adjudges the carrier responsible, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions the carrier is an insurer against all losses. The expressions "act of God" and "inevitable accident" have sometimes been used in a similar sense, and as equivalent terms. But there is a distinction. That may be an "inevitable accident" which no foresight or precaution of the carrier could prevent; but the phrase "act of God" denotes natural accidents that could not happen by the intervention of man—as storms, lightning and tempest. The expression excludes all human agency. In the case of Trent Proprietors v. Wood, 4 Doug. 287, Lord Mansfield said: "The general principle is clear. The act of God is natural necessity—as winds and storms—which arise from natural causes, and is distinct from inevitable accident." The same judge, in Forward v. Pittard, 1 T. R. 27, defined the "act of God" to be something in opposition to the act of man—adding "that the law presumes against the carrier, unless he shows it was done by such an act as could not happen by the intervention of man—as storms, lightning and tempest."

Another principle running through the case is, that to excuse the carrier the act of God must be the sole and immediate cause of the loss. That it is the remote cause is not enough. This is illustrated in the case of Smith v. Shepherd, reported in Abbot on Shipping, part 3, chap. 4, § 1; and McArthur v. Sears, 21 Wend. (N. Y.) 190. In neither of the cases was the loss occasioned directly by natural violence, although a sudden and extraordinary flood in the one case, and a light on board a steamer which had grounded in a previous gale of wind in the other, were the remote causes. In Smith v. Shepherd, the vessel was lost by striking a floating mast attached to a vessel which had been sunk by getting on a bank that had suddenly and unexpectedly been made dangerous by an extraordinary flood. Coming in contact with the mast attached to the sunken ship, the defendant's vessel was forced by it upon the bank, altered suddenly by the flood, and was wrecked. The flood which changed the bank was the ultimate occasion of the misfortune; but it was held to be too remote. The vessel had not been forced on the bank by winds or other extraordinary violence of nature, or without human interference. The immediate cause of the loss was the coming in collision with a floating mast which some person had attached to the sunken vessel. In McArthur v. Sears, the vessel was lost in attempting to enter port, by mistaking a light on board of a steamer which had grounded in a previous gale of wind for one of two beacon lights of the port. One of the beacon lights, through some neglect, was not burning, and the light on board of the wrecked steamer was easily mistaken for it. It was a dark night, the snow was falling, and there was a considerable wind. The

mistake occasioned the loss of the vessel without any fault of her master or crew, yet it was held that the carrier was not excused.

In the present case the sinking of the defendant's vessel was not directly caused by the act of God. The immediate cause was her running upon the mast of a sloop that had been sunk in a squall of wind a day or two previously. She was not forced upon the mast which stove in her bottom by the wind or current, and although the sloop may have been sunk by the violence of the wind, yet that was but the remote cause of the loss of the defendant's steamer. The case of Smith v. Shepherd, in its circumstances, closely resembles the present one. In that case, the defendant's vessel ran against a floating mast attached to a vessel which had been sunk by getting on a bank suddenly changed and made dangerous by a flood, and was forced by the mast upon the changed bank and wrecked. In this case, the defendant's vessel ran against the mast of a sloop that had been sunk in a sudden and violent squall of wind. In the former case, the changing of the bank was the "act of God," as spoken of in the law of carriers. So in this case the sinking of the sloop was occasioned by what may be properly called the "act of God." But neither the changing of the bank by the flood, nor the sinking of the sloop by the sudden and violent squall, was alone the cause of the loss of the defendant's vessel. Human agency intervened in the one case, by attaching to the sunken vessel the floating mast with which the lost vessel came in contact; and in this other, by placing the sloop in the position in which she was overtaken by the wind. All the cases agree that by the expression "act of God," is meant something which operates without any aid or interference from man; and when the loss is occasioned, or is the result in any degree of human aid or interference, the case does not fall within the exception to the carrier's liability. I am of the opinion therefore that had the defendant shown that the plaintiff's loss was occasioned by an accident, against which he could not have guarded by the exercise of due diligence and precaution, it would not have absolved him from his responsibility as a carrier. * * *

SHAACHT v. ILLINOIS CENT. R. CO.

(Supreme Court of Tennessee, 1895. 94 Tenn. 658, 30 S. W. 742, 28 L. R. A. 176.)

WILKES, J. This action was instituted before a justice of the peace in Shelby county to recover from the defendant railroad company the value of a hamper basket and its contents, shipped over the road by the plaintiff from Chicago to Memphis. There was judgment before the justice of the peace for $156.50 and costs, from which the railroad company appealed to the Second circuit court of Shelby county, where the case was tried before the judge without a jury, and

judgment was rendered for the defendant railroad company, and plaintiff has appealed to this court, and assigned errors.

Plaintiff is a native of Hamburg, Germany. He left that city in 1881, and went to the Argentine Republic, where he remained until 1890; thence to Brazil, where he stayed six months; thence to Chicago, in 1891; and thence to Memphis, in 1893. He was married in 1892, in Chicago, his wife having been before and since her marriage a dressmaker and milliner for a number of years. When about to leave Chicago for Memphis, on the 12th of December, 1893, the plaintiff delivered for shipment to the agent of the Illinois Central Railroad Company a lot of freight to be shipped to Memphis, consisting of four boxes, two trunks, three barrels, one sewing machine, one table, one bundle table leaves, two bundles of toy chairs, two bundles of bedding, one basket and contents, and a number of other small articles. Plaintiff carried these goods to the depot, accompanying the express driver, and his statement is that, the day being bitterly cold, all were eager to be relieved as soon as practicable. The agent of the railroad company, seeing the lot of articles to be shipped, cried out to his assistant, "Household goods," and plaintiff, standing by, heard this, but said nothing, but explains in his testimony that he had never previously shipped any goods by freight, and did not know there were different rates of charges depending on different classification of freight. He inquired the amount of the freight bill, but was told he could pay it at Memphis, and he made no reply, and said no more. The goods were placed in a freight car, and it was sealed, and so remained until it reached its destination, when, upon opening the car, and delivering the remainder of the goods, it was ascertained that the basket and contents were missing, and they have never been found or delivered, though search has been made for them by the railroad company.

The goods were billed at 1,700 pounds, and the freight rate charged was 43 cents per 100, being what is known as a "fourth-class" freight rate. Upon the bill were written the words, "Owners' risk rel. to value $5.00." Plaintiff testifies that he did not know the meaning of these words; that they were not explained to him; and he could not ascertain, though he inquired of several persons; but the best impression he could get was that, if the goods were lost, he would receive $500. The words are shown to mean that the goods are shipped at the risk of the owner, and the railroad company released of all liability beyond $5 per 100 pounds. The freight rate charged—43 cents per 100 pounds—was the usual rate charged for household goods, and the railroad employés state that they were received and shipped as such household goods. This basket is described as being about 5 feet long and 2½ feet wide, there being two of them lashed together with a rope or clothes line. No one except the wife of the plaintiff testifies as the contents of the basket, but she states that it contained the following articles: A blue suit men's clothes, $25; set table cloths

and napkins, $9; linen table cloth, $1.75; one linen table cloth, $1.35; one-half dozen solid silver table spoons, marked "A. S.," $15; 2 dozen linen towels, $12; 7 yards black basket cloth, $4.20; 10 yards figured cotton cloth, $1.25; 3 yards red plush, $4.50; 3 yards gray ottoman silk, $3.75; 2 yards red satin, $1.50; 3½ yards blue velvet, $5.25; 10 yards black silk grenadine, $10; 7 yards Henrietta cloth, $8.75; 5 yards brown flannel, $3.25; box tidies, ribbons, and notions, $4; 2 vases, $8; black shirt, with ruffle, $3.50; bed spread, $1.25; 2 pictures and frames, $4; 3 silk scarfs, $3.50; chenille table spread, $7.50; 2 pair lace curtains, $7; 7 roll styles pictures, $5.25; 1 pair pillow shams, $2.50; 1 rubber wrapper, $3.50; total, $156.50. It appears from the statement of Mrs. Shaacht that these articles were in the main goods to be sold by her in her business. The pictures were of members of the family, and the spoons a gift from her mother.

It is insisted by plaintiff that there was no intentional fraud upon his part in shipping these goods, and that he did not know the rates of charges depended on the classification of the freight or character of the goods shipped, and that the circuit judge was in error in denying him a judgment for the value of the goods. Plaintiff's counsel assents to the proposition of law that when the value of the goods is deliberately and intentionally concealed by the shipper for the purpose of cheating the carrier out of his reasonable hire, the carrier would not be liable in case of loss, and the shipper could have no relief. But it is insisted that in this case the shipper was inexperienced, had never shipped anything in his life, and did not know the rule of railroad companies in fixing rates and classing freights, and hence was not guilty of intentionally defrauding or attempting to defraud the railroad company. We are unable, from the facts disclosed in this record, to regard the conduct of plaintiff in the light in which counsel places it. Plaintiff was a man of intelligence, about 35 years of age, who had traveled much; a machinist by trade. His wife had also engaged in business, and it is hardly credible that these two persons should have been so ignorant in regard to shipments of goods as they profess to have been. Indeed, the circumstances of the shipment tend more strongly to establish a case of premeditated imposition on the railroad company than one of simple ignorance and innocence. The shipment of silks, satins, laces, curtains, silver spoons, and other articles of value in a basket with a rope around it, and without making known its contents, is not satisfactorily explained upon the ground of ignorance. They had two trunks in the same shipment, both with locks, and, while the proof does not disclose in detail what they contain, we cannot presume their contents were so valuable as the contents of this basket, without heightening the fraud in the transaction; and no good reason is given why these valuables were not placed in the trunks, except as to the pictures, that were too large for that disposition to be made of them. We can but regard the action of the plaintiff in standing by and assenting to the statement that they were

household goods, as well as the manner in which they were shipped and packed, as a constructive, if not actual, fraud upon the railroad company to obtain cheaper rates of freight than could otherwise be had. Some of the articles, especially the silver spoons, would not have been shipped as freight by the defendant company on any terms, and none of the shipment was, strictly speaking, "household goods," except a few articles; the silks and other goods being in piece, never having been used, and upon them the rate would have been, if shipped at all, as high as $1.70 per 100, instead of 43 cents, as charged. It is true, this rate was not fixed when the goods were delivered at Chicago, but it was so fixed afterwards, and assented to by the plaintiff when he received the goods at Memphis.

The case of Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587, is a well-considered one, and lays down in emphatic language the nonliability of the carrier of baggage under similar facts. In that case a traveling salesman for a jewelry firm bought a passenger ticket for passage on a railroad, and presented a trunk to be checked to the place of destination, without informing the agent of the company that the trunk contained jewelry, which it did, and without being inquired of by the agent as to what it did contain. He paid a charge for overweight as personal baggage, and the trunk was checked. It was of a dark brown color, and of a kind known as "jewelry trunks." It had been a practice of the jewelry company to send out trunks filled with goods, the trunks being of similar character to the one in question; and, as a rule, they were checked as personal baggage. But there was no evidence to show that the railroad company or their agents knew what the trunks contained. Now, that was a much stronger case that the one at bar, because in that case the articles were checked as personal baggage, and yet the supreme court held: (1) There was no evidence showing or tending to show that the agent of the railroad company had any actual knowledge of the contents of the trunk; (2) that there was no evidence from which it could fairly be said that the agent had reason to believe that the trunk contained jewelry; (3) the agent was not required to inquire as to the contents of the trunk so presented as personal baggage; and (4) the company was not liable for the loss of the contents of the trunk. This is an important case, and reviews many cases on the subject, and, coming from the highest court, is strongly persuasive.

In 2 Am. & Eng. Enc. Law, pp. 795, 796, are given many instances of concealment of the nature and value of the articles shipped which have been held to release the carrier from liability. In Railroad Co. v. York, 18 Am. & Eng. R. Cas. 623, it was held that when goods were shipped as freight the shipper must use no artifice or fraud to deceive the carrier whereby his risk is increased, or his care and diligence lessened. If there be such fraud or concealment, the carrier is re-

lieved from liability. If money be placed in a trunk without communicating the fact to the carrier, and shipped as freight, the shipper is guilty of fraud. In Hutchinson on Carriers (sections 213, 214) it is said: "Fraud may be as effectually practiced on the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package, and the nature of its contents, if there be anything in its form, dimensions, or outward appearance which is calculated to throw the carrier off his guard, whether so designated or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as, if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled; for by such deception the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it had he known its actual value." And if, under such circumstances, money or other valuables concealed in a package be lost by his negligence or carelessness, it would be unjust to charge him with their full value, because such concealment would be a fraud upon him as respects his compensation for their carriage, and a deception as to the degree of care which the package required, and with which he would have guarded it had he been told the truth; as where money or jewels or other articles of great value are put into a valise or box, which is generally used to contain things of small value, and delivery made to the carrier without informing him of the contents, there being nothing in the appearance of the valise to indicate or apprise the carrier that it was of more than ordinary value, it would be an imposition upon him, and the law would not lend its aid in such a case to make him accountable for the money or other valuable contents if they should be lost." In the case of Kuter v. Railroad Co., 1 Biss. 35, Fed. Cas. No. 7,955, Judge Drummond charged the jury that if a railroad company knew that immigrants like the plaintiff were in the habit of putting valuable articles and money among their household goods, and from such knowledge might have inferred that plaintiff's box might contain money, then it became the duty of the company to make inquiry, in order to relieve itself from liability. The supreme court of the United States, commenting on this case, said, "We do not think such view is sound." Humphreys v. Perry, 148 U. S. 646, 13 Sup. Ct. 711, 37 L. Ed. 587.

We see no error in the record, and affirm the judgment of the court below, with costs.

HART v. CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa, 1886. 69 Iowa, 485, 29 N. W. 597.)

* * * Plaintiff placed a man in charge of the horses, and he was permitted to and did ride in the car with them. When the train reached Bancroft, in this state, it was discovered that the hay which was carried in the car to be fed to the horses on the trip was on fire. The car was broken open, and the man in charge of the horses was found asleep. The train-men and others present attempted to extinguish the fire, but before they succeeded in putting it out the horses were killed, and the other property destroyed. This action was brought to recover the value of the property. There was a verdict and judgment for plaintiff, and defendant appealed.

REED, J.[6] There was evidence which tended to prove that the fire was communicated to the car from a lantern which the man in charge of the horses had taken into the car. This lantern was furnished by plaintiff, and was taken into the car by his direction. Defendant asked the circuit court to instruct the jury that if the fire which destroyed the property was caused by a lighted lantern in the sole use and control of plaintiff's servant, who was in the car in charge of the property, plaintiff could not recover. The court refused to give this instruction, but told the jury that, if the fire was occasioned by the fault or negligence of plaintiff's servant who was in charge of the property, there could be no recovery. The jury might have found from the evidence that the fire was communicated to the hay from the lantern, but that plaintiff's servant was not guilty of any negligence in the matter. The question presented by this assignment of error, then, is whether a common carrier is responsible for the injury or destruction of property while it is in the course of transportation when the injury is caused by some act of the owner, but which is unattended by any negligence on the part of the owner.

The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for the care and safety of the property arises by implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that as the carrier ordinarily has the absolute possession and control of the property while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. If it is lost or destroyed while in his custody, the policy of the law therefore imposes the loss upon him. Coggs v. Bernard, 2 Ld. Raym. 909; Forward v. Pittard, 1 Durn. & E. 27; Riley v. Horne, 5 Bing. 217; Thomas v. Railway Co., 10 Metc. (Mass.) 472, 43 Am. Dec. 444; Roberts v. Turner, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; Moses v. Railway Co., 24 N. H. 71,

[6] Parts of the statement of facts and of the opinion are omitted.

55 Am. Dec. 222; Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42. His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong, and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which, at the time, was in the exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. See Hutch. Carr. § 216, and cases cited in the note; also Lawson, Carr. §§ 19, 23. * * *

R. E. FUNSTEN DRIED FRUIT & NUT CO. v. TOLEDO, ST. L. & W. R. CO.

(St. Louis Court of Appeals, Missouri, 1912. 163 Mo. App. 426, 143 S. W. 839.)

NORTONI, J.[1] * * * The shipment consisted of shelled English walnuts, grown in France and imported to New York, from whence they were consigned to plaintiff. The nuts had been in cold storage in New York for about three months before being loaded on the car of the Traders' Dispatch. The evidence is abundant that the nuts were sound and in good order when placed in the car in New York; but upon arriving at St. Louis they were found to be wormy, and most of them contained moths and fine web. To diminish the loss as much as possible, plaintiff assorted and "picked over" the nuts, and a considerable percentage thereof was thrown away as spoiled, while others were placed in cold storage and marketed as merchantable. The evidence is, and, indeed, it is conceded as a fact, that the usual time for the transportation and delivery of freight between New York and St. Louis by the Traders' Dispatch is from three to five days, and the particular shipment involved here was fourteen days in transit. The nuts were in boxes and stored in a closed box car, which seems to have been delayed, from some cause not shown, at different points along the route. The car containing the nuts left New York on Oc-

[1] Parts of the opinion are omitted.

tober 1st, and was delivered in St. Louis on October 14th. It is shown that the weather was warm; for the thermometer at different points along the route ranged from 62 to 75 degrees at the United States weather stations. It is shown in evidence that worms, moths, and webs in the shelled nuts originate from a germ or egg deposited in the bloom before the nuts are formed; and that this egg or germ of animal life lays dormant throughout and comes to naught, unless an exposure to excessive heat is had. If the nuts are kept in cold storage, as is the practice by dealers, the worms and moths never appear; but, if exposed for some time to a degree of heat above 70, animal life is generated therein.

The president of plaintiff company testified that, if the nuts were subjected to a degree of temperature over 75, the egg or germ of animal life deposited therein would ultimately hatch, or give forth the worm. The same witness said at 70 degrees of heat it would take several months for the eggs to hatch, and at 80 degrees from 3 to 6 weeks; at 75 degrees, it would require about 30 days to develop animal life from the germ. Because of this, it is argued the damage to the nuts obviously resulted from an infirmity inherent in the goods themselves, for which the carrier is not liable to respond. No one can doubt that the carrier is not liable for such damages as may result solely from an inherent infirmity in the goods in his care, no more than is he liable for loss entailed solely by the act of God, the public enemy, or the carelessness of the shipper. See Hutchinson on Carriers (2d Ed.) § 216a; Libby v. St. L., I. M., etc., R. Co., 137 Mo. App. 276, 117 S. W. 659. But, though such be true, it is true as well that the carrier is liable to respond for the results of his own negligence, and if it appears that his negligent conduct conduced to set the inherent infirmity in the goods in motion, to the damage of the owner, it will suffice; in other words, the exemption on account of the infirmity of the goods obtains only where the loss is solely attributable to such infirmity, for if the carrier's negligence commingles with the infirmity and contributes in part to the damage, liability is entailed therefor against the carrier for its tortious conduct. See Gratiot St. Warehouse Co. v. M., K. & T. R. Co., 124 Mo. App. 545, 102 S. W. 11. There is evidence in the record suggesting that, though the germ of animal life slumbered in the nuts, it would not have resulted in damage to plaintiff but for the fault of defendant in unduly withholding them from cold storage, in a closed car, for a considerable number of days during the heated season. This being true, the question as to whether or not the loss occurred solely from the inherent infirmity in the goods, or was induced by defendant's carelessness as a contributing cause, was one for the jury.

It is earnestly argued that, though an unusual delay of eight or nine days occurred in this shipment, the record is devoid of evidence tending to prove negligence on the part of the carrier, for the reason the particular cause of such delays is not pointed out in the proof.

An officer of the Traders' Dispatch testified for plaintiff that the delay occurred; and that, though he had investigated the cause thereof, he did not remember what it was. However, it is shown by the overwhelming evidence that, though the freight was perishable, and so known to be by the Traders' Dispatch, if not by this defendant, the car was permitted to stand over 24 hours at Sayre, Pa., and 40 hours in Buffalo, N. Y., while the regular time from New York to St. Louis was from 72 to 120 hours, and other trains containing freight, in charge of the Traders' Dispatch, were running out of New York to St. Louis daily, passing this particular car on the line. The shipment consumed 4 days from Cleveland, Ohio, to East St. Louis, and was delayed by the Terminal Railroad Association, a member of the Traders' Dispatch, at East St. Louis 3 days, within 4 or 5 miles of its final destination. While it is true that mere delay, standing alone, is not evidence of negligence, such unusual and extraordinary delays at different points along the route, when it appears other shipments in possession of the same carrier are passing along, are circumstances sufficient to afford a strong inference that defendant neglected its obligation in respect of exercising diligence, to the end of transporting the freight within a reasonable time. For when the relation and situation of the carrier and shipper are considered, but slight evidence in respect of such matters will suffice, as the parties are in no sense on equal footing. It would be difficult, indeed, for the shipper to point out the precise cause of delay, and that it was a negligent one, and the law reckons with this by casting the burden of proof on the carrier who is possessed of all the facts which may explain its otherwise seeming default, when the shipper has shown collateral facts and circumstances sufficient to suggest a reasonable inference of neglect on the part of the carrier. There is an abundance here to support the charge of negligence touching the carrier's obligation to transport the goods within a reasonable time, as will appear by reference to the following authorities, which are apropos to the question: Gilbert v. Chicago, R. I., etc., R. Co., 132 Mo. App. 697, 112 S. W. 1002; Libby v. St. L., I. M., etc., Ry. Co., 137 Mo. App. 276, 117 S. W. 659; Bushnell v. Wabash R. Co., 118 Mo. App. 618, 94 S. W. 1001; Anderson v. Atchison, T. & S. F. R. Co., 93 Mo. App. 677, 67 S. W. 707; Hamilton v. Wabash R. Co., 80 Mo. App. 597, 599, 600.

But the mere fact that negligence is shown with respect to the obligation to transport within a reasonable time will not of itself authorize a recovery for plaintiff, unless it appears, too, that such negligence was the proximate, or operated as a direct, cause to induce the generation of animal life in the nuts, and thus entailed the damage complained of. On this feature of the case, the record is not replete with evidence; but we believe there is sufficient in the facts and circumstances to authorize a reasonable inference that the worms in the nuts were occasioned through their being retained in a closed box car for a number of days in railroad yards along the route during

a heated spell. It appears that shelled English walnuts are kept by the dealers in cold storage, in order to prevent the hatching of the germ which inhabits them. The identical nuts involved here were in cold storage for a period of three months in New York before the shipment, and it is to be inferred that, had they reached St. Louis within 3 to 5 days, and been deposited in cold storage again, the worms would not have appeared. It is true the president of plaintiff company said that at 80 degrees it would require from 3 to 6 weeks to hatch the eggs. The proof is clear, however, that at from 70 to 75 degrees the germs will hatch and give forth worms. At different places along the route, the thermometer at the government weather stations is shown to have registered from 68 to 75 degrees. But the thermometer readings were had at the weather stations, and not inside of a closed box car laden with boxes of shelled nuts. There is evidence in the record from which it may be inferred that the condition of temperature would be considerably higher than 80 degrees within an inclosed box car laden with shelled nuts, while the car was standing at different places in the railroad yards throughout the country during the days the thermometer ranged from 70 to 75 at the nearby weather stations. In view of all of the facts and circumstances, and the inferences which they afford, we believe this question, too, was one for the jury. * * *

BEARD et al. v. ILLINOIS CENT. R. CO.

(Supreme Court of Iowa, 1890. 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381.)

Action to recover damages for injury sustained by plaintiffs from the negligence of defendant in transporting a car-load of butter, which it had received as an intermediate carrier, whereby the butter was greatly injured. There was a verdict and judgment for plaintiff. Defendant appeals.

BECK, J.[8] * * * 2. We will proceed to inquire as to the duty of defendant upon receiving the butter in a car from the Cairo Short Line for transportation to New Orleans, without directions or instructions as to the character of the car in which it should be carried. A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. He must guard the goods from destruction or injury by the elements; from the effects of delays; indeed, from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated. Unknown causes, or

[8] Parts of the opinion are omitted.

those which are inherent in the nature of goods, and cannot be, in the exercise of diligence, averted, will not render the carrier liable. The nature of the goods must be considered in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine, and heat, and must have cars fitted for their safe transportation. Live animals must have food and water, when the distance of transportation demands it. Fruit, and some other perishable articles, must be carried with expedition and protection from frost. So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight-bills, or by other papers accompanying the shipment.

In the case before us, the marks on the package and the way-bill disclosed that the subject of shipment was butter. The employés of defendant were endowed with intelligence which taught them that the season was summer, when warm weather prevailed; that butter, in common cars, would be greatly injured by the ordinary heat of the climate; and that the butter, as it approached its destination, would be subject, by reason of the change of latitude, to greatly increased heat from the weather. All these things are familiarly known to all men. Surely, the law will presume that defendant's employés had full knowledge thereof. The law required the defendant, having received the perishable cargo involved in this suit, to exercise the care and diligence necessary to protect it; and, if improved cars for the transportation of articles of commerce liable to injury from heat were in use, it was defendant's duty to use such cars in carrying the butter. These views are supported by the following, among other, cases: Hewett v. Railway Co., 63 Iowa, 611, 19 N. W. 790; Sager v. Railway Co., 31 Me. 228, 50 Am. Dec. 659; Hawkins v. Railway Co., 17 Mich. 62, 92 Am. Dec. 179; Great Western Ry. Co. v. Hawkins, 18 Mich. 427; Railroad Co. v. Pratt, 22 Wall. 123, 22 L. Ed. 827; Wing v. Railway Co., 1 Hilt. (N. Y.) 241; Transportation Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757. As to the duty of defendant to use cars so constructed and used as to avoid injury from heat, see Hutch. Carr. § 294; Boscowitz v. Express Co., 93 Ill. 525, 34 Am. Rep. 191; Steinweg v. Railway Co., 43 N. Y. 123, 3 Am. Rep. 673.

3. But it is said (1) that defendant did not have refrigerator-cars which it could have used on the day it received the butter; (2) that the cars were sealed; (3) that it was accustomed to haul the cars received from the Cairo Short Line without changing the cargo. We may here assume that defendant will be excused from using refrigerator-cars. But it is shown that the butter could have been carried safely by the use of ice in the box-cars. It was defendant's duty to use it. But, having accepted the butter for transportation, defendant cannot escape liability for not safely transporting it, on the ground that it did not have cars sufficient for that purpose. Railway Co. v. Swift, 12 Wall. 262, 20 L. Ed. 423; Helliwell v. Railway Co. (C. C.) 7 Fed. 76;

Paramore v. Railway Co., 53 Ga. 385. The sealing of the car was not to protect it from defendant, the carrier having it under control. Surely, if it was necessary for the protection of the goods, defendant had full power to enter the car, and failure to exercise the power was negligence. Dixon v. Railway Co., 74 N. C. 538. The custom of the defendant and Cairo Short Line cannot be invoked to protect one or both from negligence causing destruction to goods transported by them. A custom to take cars without changing the goods in them, when their safety demanded it, would be a custom based upon negligence, and cannot be regarded or enforced. Hamilton v. Railway Co., 36 Iowa, 31; Allen v. Railway Co., 64 Iowa, 95, 19 N. W. 870.

4. It is said that the rate of charges, as shown by the way-bill, was for common cars, and the defendant, therefore, undertook to furnish no other kind. If the freight charges fixed in the way-bill do not express a contract that the butter may be transported so as to destroy its value, and that the carrier is excused from the exercise of the care required of him by law, we think the freight charges in no case will limit the care to be exercised by the carrier, and restrict his liability. The defendant was not restricted, by the rate of freight charges named in the way-bill, from claiming and enforcing the payment of a just compensation for charges incurred on account of outlays made in order to safely transport the goods. Sumner v. Association, 7 Baxt. (Tenn.) 345, 32 Am. Rep. 565. Many of the rulings of the superior court upon the admission of evidence and instructions, objected to by defendant, are in accord with the views we have expressed. * * *

III. Carriers of Live Stock[9]

EVANS v. FITCHBURG R. CO.

(Supreme Judicial Court of Massachusetts, 1872. 111 Mass. 142, 15 Am. Rep. 19.)

AMES, J.[10] According to the established rule as to the liability of a common carrier, he is understood to guarantee that (with the well-known exception of the act of God and of public enemies) the goods entrusted to him shall seasonably reach their destination, and that they shall receive no injury from the manner in which their transportation is accomplished. But he is not, necessarily and under all circumstances, responsible for the condition in which they may be found upon their arrival. The ordinary and natural decay of

[9] For discussion of principles, see Dobie, Bailm. & Carr. § 119

[10] The statement of facts is omitted.

fruit, vegetables and other perishable articles; the fermentation, evaporation or unavoidable leakage of liquids; the spontaneous combustion of some kinds of goods; are matters to which the implied obligation of the carrier, as an insurer, does not extend. Story on Bailments, §§ 492a, 576. He is liable for all accidents and mismanagement incident to the transportion and to the means and appliances by which it is effected; but not for injuries produced by, or resulting from, the inherent defects or essential qualities of the articles which he undertakes to transport. The extent of his duty in this respect is to take all reasonable care and use all proper precautions to prevent such injuries, or to diminish their effect, as far as he can; but his liability, in such cases, is by no means that of an insurer.

Upon receiving these horses for transportation, without any special contract limiting their liability, the defendants incurred the general obligation of common carriers. They thereby became responsible for the safe treatment of the animals, from the moment they received them, until the carriages in which they were conveyed were unloaded. Moffat v. Great Western Railway Co., 15 Law T. (N. S.) 630. They would be unconditionally liable for all injuries occasioned by the improper construction or unsafe condition of the carriage in which the horses were conveyed, or by its improper position in the train, or by the want of reasonable equipment, or by any mismanagement, or want of due care, or by any other accident (not within the well-known exception) affecting either the train generally or that particular carriage. But the transportation of horses and other domestic animals is not subject to precisely the same rules as that of packages and inanimate chattels. Living animals have excitabilities and volitions of their own which greatly increase the risks and difficulties of management. They are carried in a mode entirely opposed to their instincts and habits; they may be made uncontrollable by fright, or notwithstanding every precaution, may destroy themselves in attempting to break loose, or may kill each other. If the injury in this case was produced by the freight, restiveness, or viciousness of the animals, and if the defendants exercised all proper care and foresight to prevent it, it would be unreasonable to hold them responsible for the loss. Clarke v. Rochester & Syracuse Railroad Co., 14 N. Y. 570, 67 Am. Dec. 205. Thus it has been held that if horses or other animals are transported by water, and in consequence of a storm they break down the partition between them, and by kicking each other some of them are killed, the carrier will not be held responsible. Laurence v. Aberdein, 5 B. & Ald. 107; Story on Bailments, § 576; Angell on Carriers, 214a. The carrier of cattle is not responsible for injuries resulting from their viciousness of disposition, and the question what was the cause of the injury is one of fact for the jury. Hall v. Renfro, 3 Metc. (Ky.) 51. And in a New York case, Conger v. Hudson River Railroad Co., 6 Duer, 375, Mr. Justice Woodruff says, in behalf of the court: "We are not able to perceive any reason upon

which the shrinkage of the plaintiff's cattle, their disposition to become restive, and their trampling upon each other when some of them lie down from fatigue, is not to be deemed an injury arising from the nature and inherent character of the property carried, as truly as if the property had been of any description of perishable goods."

It appears to us, therefore, that the first instruction which the defendants requested the court to give should have been given. If the jury found that the defendants provided a suitable car, and took all proper and reasonable precautions to prevent the occurrence of such an accident, and that the damage was caused by the kicking of one horse by another, the defendants were entitled to a verdict. That is to say, they might be held to great vigilance, foresight and care; but they were not absolutely liable as insurers against injuries of that kind. As there was evidence also tending to show that the halter was attached by the plaintiff to the jaw of one of the horses in a manner which might cause or increase restiveness and bad temper, and also evidence that their shoes were not taken off, the defendants were entitled to the instruction that if the injuries were caused by the fault or neglect of the plaintiff in these particulars, he could not recover. This court has recently decided that for unavoidable injuries done by cattle to themselves or each other, in their passage, the common carrier is not liable. Smith v. New Haven & Northampton Railroad Co., 12 Allen, 531, 90 Am. Dec. 166. This is another mode of saying that a railroad corporation, in undertaking the transportation of cattle, does not insure their safety against injuries occasioned by their viciousness and unruly conduct. Kendall v. London & Southwestern Railway Co., L. R. 7 Ex. 373. The jury should therefore have been instructed that if the injury happened in that way, and if the defendants exercised proper care and foresight in placing and securing the horses while under their charge, they are not to be held liable in this action. Upon this point the burden of proof may be upon the defendants, but they should have been permitted to go to the jury upon the question whether there had been reasonable care on their part.

It appears to us, also, that the instruction actually given was not a full equivalent for that which was requested, and which, as we have seen, should have been given. It was not necessary to the defense to show that the injury was caused in "an outburst of viciousness." The proposition should have been stated much more generally, and the jury should have been told that if from fright, bad temper, viciousness, or any other cause without fault on the part of the defendants, the horses became refractory and unruly, and the kicking and injury were occasioned in that manner, it was an unavoidable accident, for which the defendants were not liable.

Exceptions sustained.

IV. Liability of the Common Carrier of Goods for Delay [11]

CONGER v. HUDSON RIVER R. CO.

(Superior Court of City of New York, 1857. 6 Duer, 375.)

* * * The plaintiffs claimed to recover for the damages sustained from the injuries to and the shrinkage of the cattle, and also damages for the loss of the market on Thursday. The defendants sought to excuse the delay by showing that it happened without their fault.

The judge charged that common carriers are responsible for damages to personal property, whilst in their care, which may be ultimately delivered, whether such injury was occasioned by the carelessness or negligence of the carriers or not; that in this case the delay which caused the damage arose out of a collision between a train of the defendants and a train of the Hudson & Berkshire Railroad Company; and that the defendants were responsible for the damages sustained, although that collision was caused by the negligence of the Hudson & Berkshire Road alone.

To these portions of the charge the defendants excepted.

WOODRUFF, J.[12] The undertaking and duty of a common carrier, on receiving goods for carriage, is twofold: First, to carry and deliver safely; second, so to carry and deliver within a reasonable time.

The first duty is absolute. Nothing but the act of God or the public enemies will relieve the carrier from its performance.

The second duty is relative, depending upon various circumstances and conditions under which goods are received, the means at the command of the carrier, and the absence of fault on his part in the provision he has made for the performance of his duty.

What is a reasonable time must always be determined by the circumstances under which the carrier acts, and not by the inquiry what under other circumstances would be reasonable, nor even by the inquiry what period is ordinarily required for the performance of the service.

The distinction above stated is to be found in the elementary writers treating of the law of common carriers, and is, I apprehend, too well settled to be now open for discussion; and its recognition in this state unequivocally appears in Parsons v. Hardy, 14 Wend. 217, 28 Am. Dec. 521; Harmony v. Bingham, 12 N. Y. 99,

[11] For discussion of principles, see Doble, Bailm. & Carr. § 122.

[12] The statement of facts has been shortened, and parts of the opinion have been omitted.

62 Am. Dec. 142; Wibert v. New York & Erie Railroad Co., 12 N. Y. 245; Id., 19 Barb. 36.

The delay in the present case is alleged by the defendants to have arisen from the negligent act of another railroad company without fault on their part, by which their cars were thrown from the railroad track, and the passage of the following train (containing the plaintiffs' property) necessarily hindered.

The case of Parsons v. Hardy presented the precise question whether such an accident caused by the act of third parties, through their misadventure or negligence, excused the delay. The court held "that evidence that the delay was so caused was admissible," and that if the fact were proved, and the accident shown to have occurred without any want of diligence, care and skill on the part of the carrier, it would excuse the delay. * * *

How the jury would have found, had the question whether the delay, and the consequent injury to the plaintiffs' cattle, were without the fault or negligence of the defendants or their servants, been submitted to them, we are not able to say. If we could determine what is the weight of the evidence upon that subject, we should not consider ourselves at liberty to do so. But if the jury had found in the defendants' favor upon that question, then the delay was caused by what was, as to the defendants, an inevitable accident, which, according to the cases mentioned, would excuse them.

If, then, the defendants are not responsible for the delay in the delivery, that being excused, the excuse must necessarily relieve them from liability for any injury to the property which is the mere result of the delay; that is, in the case before us, the injury described by the witness as the shrinkage, fatigue, and trampling of the cattle upon each other, by reason of the increased time consumed in the carriage.

So far as this was the mere result of delay, it must stand upon the same footing as the depreciation or deterioration of property, in the course of transportation, from its own inherent character and liability to decay, or injury from mere lapse of time, or from the act of carriage itself. No rule of responsibility imposes upon the carrier losses arising from the ordinary deterioration of goods in quantity or quality, in the course of transportation, or from their inherent infirmity or tendency to decay.

We are not able to perceive any reason upon which the shrinkage of the plaintiffs' cattle, their disposition to become restive, and their trampling upon each other when some of them lie down from fatigue, is not to be deemed an injury arising from the nature and inherent character of the property carried, as truly as if the property had been of any description of perishable goods.

The rule undoubtedly requires of the carrier that he use all reasonable and proper care that the delay may not be unnecessarily prejudicial.

And under the rule above stated, if the delay was without the fault of the defendants, it is entirely clear that the damages, which consisted (as alleged) in the loss of the market, cannot be recovered. The claim has no foundation whatever, save in the mere lapse of time, and if that be excused the claim is obviously groundless. * * *

GREISMER v. LAKE SHORE & M. S. R. CO.

(Court of Appeals of New York, 1886. 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.)

EARL, J.[18] We are of opinion that the learned trial judge fell into error as to rules of law of vital and controlling importance in the disposition of this case. A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay, and to forward the goods to their destination; and so it has been uniformly decided. Wibert v. New York & E. R. Co., 12 N. Y. 245; Blackstock v. New York & E. R. Co., 20 N. Y. 48, 75 Am. Dec. 372. In the absence of special contract, there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks, or disable the rolling stock, or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.

While the court below conceded this to be the general rule, it did not give the defendant the benefit of it because it held that the men engaged in the violent and riotous resistance to the defendant were its employés, for whose conduct it was responsible; and in that holding was the fundamental error committed by it. It is true that these men had been in the employment of the defendant. But they left and abandoned that employment. They ceased to be in its service, or in any sense its agents for whose conduct it was responsible. They not only refused to obey its orders, or to render it any service, but they willfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of employés who were willing to serve it. They became a mob of vicious law-

[18] The statement of facts is omitted.

breakers, to be dealt with by the government, whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights, and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger cars and assaulted passengers, upon what principle could it be held that, as to such acts, they were the employés of the defendant, for whom it was responsible? If they had sued the defendant for wages for the 11 days when they were thus engaged in blocking its business, no one will claim that they could have recovered.

It matters not, if it be true, that the strike was conceived and organized while the strikers were in the employment of the defendant. In doing that, they were not in its service, or seeking to promote its interests, or to discharge any duty they owed it, but they were engaged in a matter entirely outside of their employment, and seeking their own end, and not the interests of the defendant. The mischief did not come from the strike,—from the refusal of the employés to work,—but from their violent and unlawful conduct after they had abandoned the service of the defendant.

Here, upon the facts which we must assume to be true, there was no default on the part of the defendant. It had employés who were ready and willing to manage its train, and carry forward the stock, and thus perform its contract and discharge its duty; but they were prevented by mob violence, which the defendant could not by reasonable efforts overcome. That, under such circumstances, the delay was excused, has been held in several cases quite analogous to this, which are entitled to much respect as authorities. Pittsburgh, etc., R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422; Pittsburgh, C. & St. L. Ry. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63; Lake Shore & M. S. R. Co. v. Bennett, 89 Ind. 457, 6 Amer. & Eng. R. Cas. 391; Indianapolis & St. L. R. Co. v. Juntgen, 10 Ill. App. 295.

The cases of Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474, and Blackstock v. New York & E. R. Co., 1 Bosw. (N. Y.) 77, affirmed 20 N. Y. 48, 75 Am. Dec. 372, do not sustain the plaintiff's contention here. If, in this case, the employés of the defendant had simply refused to discharge their duties or to work, or had suddenly abandoned its service, offering no violence, and causing no forcible obstruction to its business, those authorities could have been cited for the maintenance of an action upon principles stated in the opinions in those cases.

We are therefore of opinion that the judgment should be reversed, and a new trial granted; costs to abide the event. All concur.

LIABILITY UNDER SPECIAL CONTRACT

I. The Method of Limiting the Carrier's Liability [1]

BLOSSOM v. DODD.

(Court of Appeals of New York, 1870. 43 N. Y. 264, 3 Am. Rep. 701.)

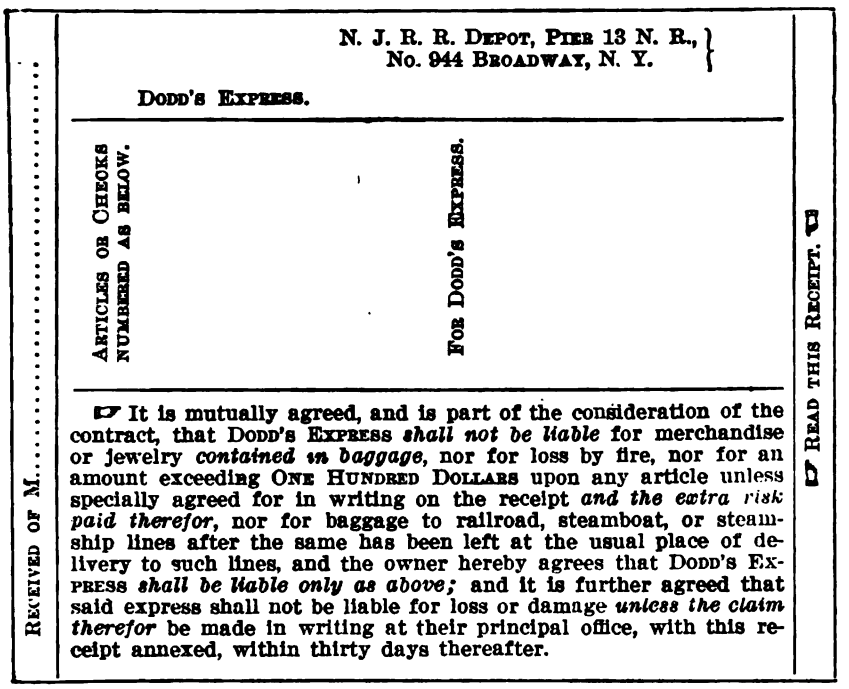
Appeal from an order of the General Term of the Supreme Court, in the second judicial district, setting aside a judgment entered upon the report of a referee and granting a new trial.

This action was brought to recover for baggage of the plaintiff lost by the defendant. The defendant was the president of Dodd's Express, a joint stock company, doing business in the city of New York and its vicinity.

On the 17th of October, 1866, the plaintiff was a passenger on a train of cars, which was proceeding to New York on the New Jersey Central Railroad. When the train was nearly at the end of its route, and between the hours of ten and eleven o'clock in the evening, a messenger of Dodd's Express entered the car and inquired of him if he had any baggage to be delivered.

The plaintiff thereupon handed to the messenger two railroad baggage-checks, one of which was for a gun-case containing a gun, and the other was a valise containing wearing apparel and other articles. The messenger entered the numbers of the checks in pencil upon a card or receipt of which the following is a copy, omitting the advertisement in large type at the top of the paper.

[1] For discussion of principles, see Dobie, Bailm. & Carr. §§ 123–126.



RECEIVED OF M.....

N. J. R. R. DEPOT, PIER 13 N. R., No. 944 BROADWAY, N. Y.

DODD'S EXPRESS.

ARTICLES OR CHECKS NUMBERED AS BELOW.

FOR DODD'S EXPRESS.

☞ READ THIS RECEIPT. ☜

☞ It is mutually agreed, and is part of the consideration of the contract, that DODD'S EXPRESS *shall not be liable* for merchandise or jewelry *contained in baggage*, nor for loss by fire, nor for an amount exceeding ONE HUNDRED DOLLARS upon any article unless specially agreed for in writing on the receipt *and the extra risk paid therefor*, nor for baggage to railroad, steamboat, or steamship lines after the same has been left at the usual place of delivery to such lines, and the owner hereby agrees that DODD'S EXPRESS *shall be liable only as above;* and it is further agreed that said express shall not be liable for loss or damage *unless the claim therefor* be made in writing at their principal office, with this receipt annexed, within thirty days thereafter.

At the time the cars were running rapidly, the lights were mostly out, and the car in which the plaintiff was, was nearly dark, but there was one light at the end. This light was insufficient to enable the plaintiff to read the printed matter at the place where he sat, and he did not read it.

The said Dodd's Express received the valise and gun-case from the railroad company, and on the following day delivered the gun-case, but neglected to deliver the valise or any of its contents to the plaintiff. Evidence tending to show it was stolen, or fell from one of the plaintiff's wagons, was given. The valise and its contents were worth about $260. The referee found that the valise was stolen from the defendant's wagon.

The answer put in issue the evidence and the value of the property lost, and set up a special contract restricting the liability of the defendant.

The case was tried before a referee, who found, as conclusions of law: (1) The said baggage was received by the said Dodd's Express, to be transported to plaintiff's residence, under and subject to the conditions expressed in said receipt, and not otherwise. (2) That, by delivery to the plaintiff, and his acceptance of the said card or receipt, under the circumstances, he consented and agreed that said Dodd's

Express should not be liable for the loss of said valise to an amount exceeding one hundred dollars. (3) That the plaintiff is entitled to recover from defendant only the sum of one hundred dollars and interest from October 17, 1866. To all of which conclusions of law the plaintiff excepted.

From the judgment entered upon this report, an appeal was taken to the General Term, where the judgment was set aside and a new trial ordered; and from such order an appeal was taken to this court.

CHURCH, C. J. The common-law liability of common carriers cannot be limited by a notice, even though such notice be brought to the knowledge of the persons whose property they carry. Dorr v. N. J. Steam Navigation Co., 11 N. Y. 485, 62 Am. Dec. 125. But such liabilities may be limited by express contract. Id.; Bissell v. N. Y. Central R. R. Co., 25 N. Y. 442, 82 Am. Dec. 369; French v. Buffalo, N. Y. & Erie R. R. Co., *43 N. Y. 108.

The principal question in this case is, whether there was a contract made between the parties limiting the liability of the defendants to a loss of $100 for the valise and its contents, which the plaintiff entrusted to their care. A fac simile of the card upon which the alleged contract was printed has been furnished in the papers. It does not appear, on examination, like a contract, and would not, from its general appearance, be taken for anything more than a token or check denoting the numbers of the checks received, to be used for identification upon delivery of the baggage. The larger portion of the printed matter is an advertisement in large type. The alleged contract is printed in very small type, and is illegible in the night by the ordinary lights in a railroad car, and is not at all attractive, while other parts of the paper are quite so.

Considerable stress is laid upon the fact that the words, "Read this receipt," were printed on the card in legible type. The receipt reads: "Received of M——— articles or checks numbered as below: 368—319." "For Dodd's Express." The blank is not filled, nor is the receipt signed by any one. The invitation is not to read the contract, but the receipt. In order to read it, the paper must be turned sideways; and no one, thus reading the receipt, would suspect that it had any connection with the alleged contract, which is printed in different and very small type across the bottom of the paper. It is no part of the receipt, it is not connected with it, and is not referred to in any part of the paper. The defendants are dealing with all classes of the community; and public policy, as well as established principles, demand that the utmost fairness should be observed.

This paper is subject to the criticism made by Lord Ellenborough, in Butler v. Heane, Camp. 415, in which he said, that "it called attention to everything that was attractive, and concealed what was calculated to repel customers;" and added: "If a common carrier is to be allowed to limit his liability, he must take care that any one who deals with him is

fully informed of the limits to which he confines it." Nor did the nature of the business necessarily convey the idea of a contract to the traveler in such a manner as to raise the presumption that he knew it was a contract, expressive of the terms upon which the property was carried, or limiting the liability of the carrier. Baggage is usually identified by means of checks or tokens. And such a card does not necessarily import anything else. At all events, to have the effect claimed, the limitation should be as conspicuous and legible as any other portions of the paper. In Brown v. E. R. R. Co., 11 Cush. (Mass.) 97, where the limitation was printed upon the back of a passenger ticket, the court say: "The party receiving it might well suppose that it was a mere check, signifying that the party had paid his passage to the place indicated on the ticket." In the cases of Prentice v. Decker, 49 Barb. (N. Y.) 21, and Limburger v. Wescott, 49 Barb. (N. Y.) 283, limitations were claimed upon the delivery of similar cards of another express company, and the court held, in both cases, that such delivery did not charge the persons receiving them with knowledge that they contained contracts.

A different construction was put upon the delivery of a similar card, in Hopkins v. Wescott, 6 Blatchf. 64, Fed. Cas. No. 6,692; but I infer that the learned judge who delivered the opinion intended to decide that something short of an express contract will suffice to screen the carrier from his common-law liability, and that a notice, personally served, which could be read, would have that effect. The attention of the court does not seem to have been directed to the distinction between such a notice and a contract. The delivery and acceptance of a paper containing the contract may be binding, though not read, provided the business is of such a nature and the delivery is under such circumstances as to raise the presumption that the person receiving it knows that it is a contract, containing the terms and conditions upon which the property is received to be carried. In such a case it is presumed that the person assents to the terms, whatever they may be. This is the utmost extent to which the rule can be carried, without abandoning the principle that a contract is indispensable. The recent case of Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131, relied upon by the defendant's counsel, was decided upon this principle. The plaintiff delivered a package of money to an express company, and took a receipt containing a provision exempting the company from liability for loss by fire; and the court held that he knew that the paper contained the conditions upon which the money was to be carried, and was therefore presumed to have assented to them, although he did not read the paper. The court say: "It is not claimed that he did not know, when he took it, that it was a shipping contract, or bill of lading" So, in Van Goll v. The S. E. R. Co., 104 Eng. Com. Law R. 75, the same principle was decided. Willes, J., said: "Assuming that the plaintiff did not read the terms of the condition, it is evident she knew they were there." Keating, J., said: "It was incum-

bent on the company to show that such was the contract." * * * "I think there was evidence that the plaintiff assented to those terms."

As to bills of lading and other commercial instruments of like character, it has been held that persons receiving them are presumed to know, from their uniform character and the nature of the business, that they contain the terms upon which the property is to be carried. But checks for baggage are not of that character, nor is such a card as was delivered in this instance. It was, at least, equivocal in its character. In such a case a person is not presumed to know its contents, or to assent to them.

The circumstances under which the paper was received repel the idea of a contract. No such intimation was made to the plaintiff. He did not, and could not, if he had tried, read it in his seat. It is found that he might have read it at the end of the car, or by the lights on the pier or in the ferry-boat; and it is claimed that he should have done so, and, if dissatisfied, should have expressed his dissent. If he had done so, and in the bustle and confusion incident to such occasions, could have found the messenger and demanded his baggage, the latter might have claimed, upon the theory of this defence, that the contract was completed at the delivery of the paper, and that he had a right to perform it and receive the compensation.

It is impossible to maintain this defense without violating established legal principles in relation to contracts. It was suggested on the argument, that the stipulation to charge according to the value of the property is just and proper. This may be true; but the traveller should have something to say about it. The contract cannot be made by one party. If the traveller is informed of the charges graduated by value, he can have a voice in the bargain; but in this case he had none. Whilst the carrier should be protected in his legal right to limit his responsibility, the public should also be protected against imposition and fraud. The carrier must deal with the public upon terms of equality; and, if he desires to limit his liability, he must secure the assent of those with whom he transacts business.

My conclusion is, that no contract was proved.

1. Because it was obscurely printed.

2. Because the nature of the transaction was not such as necessarily charged the plaintiff with knowledge that the paper contained the contract.

3. Because the circumstances attending the delivery of the card repel the idea that the plaintiff had such knowledge, or assented in fact to the terms of the alleged contract.

The order granting a new trial must be affirmed, and judgment absolute ordered for the plaintiff, with costs.

All the judges concurring, upon the ground that no contract limiting the liability of defendants was proved.

Order affirmed and judgment absolute for the plaintiff ordered.

February 5 - 1924

II. The Construction of Contracts Limiting the Carrier's Liability [2]

MYNARD v. SYRACUSE, B. & N. Y. R. CO.

(Court of Appeals of New York, 1877. 71 N. Y. 180, 27 Am. Rep. 28.)

CHURCH, C. J.[3] The parties stipulated that the animal was lost by reason of the negligence of some of the employees of the defendant, without the fault of the plaintiff. The defence rested solely upon exemption from liability contained in the contract of shipment by which, for the consideration of a reduced rate, the plaintiff agreed to "release and discharge the said company from all claims, demands, and liabilities of every kind whatsoever for or on account of, or connected with, any damage or injury to or the loss of said stock, or any portion thereof, from whatsoever cause arising."

The question depends upon the construction to be given to this contract, whether the exemption "from whatever cause arising," should be taken to include a loss accruing by the negligence of the defendant or its servants. The language is general and broad. Taken literally it would include the loss in question, and it would also include a loss accruing from an intentional or willful act on the part of servants. It is conceded that the latter is not included. We must look at the language in connection with the circumstances and determine what was intended, and whether the exemption claimed was within the contemplation of the parties.

The defendant was a common carrier, and as such was absolutely liable for the safe carriage and delivery of property intrusted to its care, except for loss or injury occasioned by the acts of God or public enemies. The obligations are imposed by law, and not by contract. A common carrier is subject to two distinct classes of liabilities—one where he is liable as an insurer without fault on his part; the other, as an ordinary bailee for hire, when he is liable for default in not exercising proper care and diligence; or, in other words, for negligence. General words from whatever cause arising may well be satisfied by limiting them to such extraordinary liabilities as carriers are under without fault or negligence on their part.

When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that con-

[2] For discussion of principles, see Doble, Bailm. & Carr. § 127.

[3] The statement of facts and parts of the opinion are omitted.

tracts will not be so construed, unless expressed in unequivocal terms. In New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465, a contract that the carriers are not responsible in any event for loss or damage, was held not intended to exonerate them from liability for want of ordinary care. Nelson, J., said: "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." This rule has been repeatedly followed in this state. * * *

So, in the Steinweg Case, 43 N. Y. 123, 3 Am. Rep. 673, the contract released the carrier "from damage or loss to any article from or by fire or explosion of any kind," and this court held that the release did not include a loss by fire occasioned by the negligence of the defendant; and, in the Magnin Case, still more recently decided by this court (56 N. Y. 168), the contract with the express company contained the stipulation "and, if the value of the property above described is not stated by the shipper, the holder thereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to, the property aforesaid." It was held, reversing the judgment below, that the stipulation did not cover a loss accruing through negligence, Johnson, J., in the opinion, saying: "But the contract will not be deemed to except losses occasioned by the carrier's negligence, unless that is expressly stipulated." In each of these cases, the language of the contract was sufficiently broad to include losses occasioned by ordinary or gross negligence, but the doctrine is repeated that, if the carrier asks for immunity for his wrongful acts, it must be expressed, and that general words will not be deemed to have been intended to relieve him from the consequences of such acts. * * *

It cannot be said that parties, in making such contracts, stand on equal terms. The shipper, in most cases, from motives of convenience, necessity or apprehended injury, feels obliged to accept the terms proposed by the carrier, and practically the contract is made by one party only, and should, therefore, be construed most strongly against him; and especially should he not be relieved from the consequences of his own wrongful acts under general words or by implication. * * *

III. Agreed Valuation of the Goods [4]

ALAIR v. NORTHERN PAC. R. CO.

(Supreme Court of Minnesota, 1893. 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588.)

MITCHELL, J.[5] The complaint alleges the delivery by plaintiff to defendant, a common carrier, of eighteen horses for transportation; that seven of the horses, of the value of $2,100, were, while in transit, killed through the negligence of the defendant. Judgment is asked for $2,100. The answer admits the delivery and receipt of the horses for transportation, their value, and their loss through its negligence, as stated in the complaint, but alleges that the property was delivered and received upon a special written contract, executed by both parties, containing the terms and conditions on which the defendant undertook to transport it, one of which was that "it is hereby further agreed that the value of the live stock to be transported does not exceed the following mentioned sums, to wit: Each horse, $100; each ox, $50; each bull, $50; each cow, $30; * * * such valuation being that whereon the rate of compensation to this company for its services and risks connected with said property is based." The answer further alleges a tender of $700, which is kept good by bringing the money into court. This appeal is from an order sustaining a demurrer to the answer on the ground that the facts stated do not constitute either a defense or counterclaim.

The sole question is whether this stipulation as to the value of the property is valid and binding, so as to limit the amount of plaintiff's recovery when the loss occurred through defendant's negligence. As against plaintiff's demurrer it must be assumed this stipulation was fairly made, and for the purpose therein expressed. How far, or in what respects, a public carrier of goods may limit his common-law liability is by no means a new question in the courts. At common law he was practically an insurer of the property. The rule imposing this extraordinary liability had its origin in considerations of public policy; and, as the duties of a common carrier are public in their nature, in the due performance of which the public at large, as well as the particular shipper, have an interest, and as the carrier and the shipper do not stand on a footing of equality, the latter often having no choice but to accept such conditions as the former might impose, the tendency of the courts formerly was to hold that it was against public policy, or, as otherwise expressed, not just and reasonable, to permit a common carrier to stipulate for any modification of

[4] For discussion of principles, see Doble, Bailm. & Carr. §§ 131–133.

[5] Parts of the opinion are omitted.

his common-law liability, even by special contract with his customer. But, in course of time, the improved state of society, the introduction of better and safer modes of transportation, the diminished opportunities of collusion and bad faith on part of the carrier, and other considerations, rendered less imperative the rigorous application of the iron rule of the common law. The result has been that the courts now uphold as just and reasonable numerous limitations to, or exemptions from, the common-law liability of carriers, which would formerly have been held against public policy and void. In fact, it has now become the accepted general business usage (which is itself strong evidence as to what is in accord with public policy) for carriers and shippers to contract for some exemptions from the strict liability imposed by common law. * * * The right of the common carrier to limit his common-law liability by special contract was fully recognized by this court as long ago as Christenson v. Express Co., 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122; but, in accord with the great weight of authority in this country, we have held that he cannot contract for exemption, either in whole or in part, from liability for the negligence of himself or his servants; that such an exemption is against public policy, because it would enable him to put off the essential duties of his public employment. Christenson v. Express Co., supra; Shriver v. Railway Co., 24 Minn. 506, 31 Am. Rep. 353; Ortt v. Railway Co., 36 Minn. 396, 31 N. W. 519; Moulton v. Railway Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; Boehl v. Railway Co., 44 Minn. 191, 46 N. W. 333.

The case, therefore, comes down to a question of the construction to be placed on this stipulation. If the purpose of it was merely to place a limit on the amount for which the defendant should be liable, then clearly, as to losses resulting from negligence, it is not just or reasonable, and is not binding on the plaintiff. On the other hand, if it was a stipulation as to the value of the property, fairly and honestly made as the basis of the carrier's charges and responsibility, then we think it ought to be upheld as a just and reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. At this point we may suggest that, so far as the question now under consideration is concerned, we see no difference between a case like the present, where the stipulation is that the value of the property does not exceed a specified sum, and one where the value is stipulated to be a specified sum; also that it makes no difference whether the valuation expressed in the contract is one previously named by the shipper on requirement of the carrier, or one inserted in the contract by the carrier without being named by the shipper, but acquiesced in by him. In either case it becomes a part of the contract on which the minds of the parties meet, and on which they act. Also, if the purpose of the stipulation is a lawful and proper one, the mere fact that it may incidentally

have the effect of limiting the amount of the carrier's liability in case of loss caused by negligence will not render it invalid.

Contracts of this kind relating to the transportation of live stock are very common, and their reasonableness, at least as applied to that class of property, seems to us quite apparent. Every one may be presumed to know approximately the average value of ordinary domestic animals, but it is well known that many animals have a special value because of some peculiar qualities—such as speed or pedigree —which are not apparent from mere inspection. For example, a horse which, to one not acquainted with it, might not appear to be worth more than any ordinary horse, might, because of speed, be worth $10,000. The agents of common carriers are not expected to be, and usually are not, experts as to the special or peculiar value of particular animals. Ordinarily they would know nothing about the matter except what they learned from the shipper's statement. Presumably, the charges for transportation are to a considerable extent based on the value of the property. Moreover, the measure of care on part of the carrier will naturally be commensurate with the value of the property intrusted to him. Consequently the law always required entire good faith on part of the shipper in stating the nature and value of property delivered to a carrier for transportation. Even when the common-law liability of carriers was enforced most rigorously, the courts always upheld limitations of it imposed for the purpose of procuring a full disclosure of the value of the property, especially of articles of unusual value, or subject to extra hazard. This is illustrated in that numerous class of cases where packages whose contents were not open to inspection were delivered to an express company or other carrier by the owner, who accepted a receipt therefor containing a condition that in case of loss the holder should not demand beyond a specified sum, at which the article was thereby valued, unless a greater value was expressed or declared. But we see no difference in principle between a case where the value of the property is unknown to the carrier because inclosed in a box, and one where it is unknown because dependent on latent qualities not ordinarily ascertainable by inspection.

We think we are justified in taking judicial notice of the fact that the maximum values placed by this contract on different kinds of domestic animals are approximately those of average ordinary animals in the country through which defendant does business. By executing this contract the plaintiff stipulated, and in effect represented to defendant, that his horses were not worth to exceed $100 each, and that the charges for transportation should be based on that valuation. Assuming, as we must, that the contract was fairly made for the purposes expressed in it, we think it ought to be upheld as just and reasonable. It is not in any proper sense a contract for exemption from the consequences of negligence. In this view we are sustained by the great weight of authority. Hart v. Railroad Co., 112 U. S. 331, 5

Sup. Ct. 151, 28 L. Ed. 717; Squire v. Railroad Co., 98 Mass. 239, 93 Am. Dec. 162; Graves v. Railroad Co., 137 Mass. 33, 50 Am. Rep. 282; Hill v. Railroad Co., 144 Mass. 284, 10 N. E. 836; Railway Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Railway Co. v. Sherrod, 84 Ala. 178, 4 South. 29; Harvey v. Railroad Co., 74 Mo. 538; Railway Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837; Duntley v. Railroad Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 49 Am. St. Rep. 610.

We cite no cases from jurisdictions where contracts for exemption from liability for negligence are upheld, as they would not be in point in this state. In fact, it will be found that there are very few authorities against our views. Most of the cases, usually carelessly cited as authority on the other side of this question, will be found, on careful examination, to be clearly distinguishable and not in point. In some of them, the stipulation was purely and solely one arbitrarily limiting the amount of recovery, without regard to the value of the property, as in Moulton v. Railway Co., supra. In others, it was held that the shipper never agreed to the limitation, and for that reason was not bound by it. In others, the decision was expressly placed on the ground that both parties knew that the property was of much greater value than that stated in the contract, and arbitrarily inserted a sum grossly disproportionate to the true value solely for the purpose of limiting the amount of the carrier's liability. * * *

Counsel for plaintiff have argued this case on the assumption that defendant knew, at the time of the shipment of the property, that these horses were actually worth $2,100, but there is no warrant for this. It by no means follows, because defendant now knows and admits their value to have been $2,100, that it knew that fact when it received the property. What would be the effect if defendant then knew that fact is a question not now before us, and which we are not called on to decide. We may say, however, that if both parties, knowing the actual value of the property, arbitrarily insert in the bill of lading a much less sum, grossly disproportionate to the real value, for the purpose of limiting the liability of the carrier for the consequences of its negligence, the stipulation would be invalid. Order reversed.

MURPHY et al. v. WELLS-FARGO & CO.

(Supreme Court of Minnesota, 1906. 99 Minn. 230, 108 N. W. 1070.)

JAGGARD, J.[6] This was an appeal from an order denying a motion for a new trial, made by the defendant and appellant. The plaintiffs and respondents, commission merchants, brought the action to recover damages alleged to have been sustained through the failure of the defendant express company to transport 550 cases of strawberries within a reasonable time, and with reasonable and ordinary

[6] Part of the opinion is omitted.

care for the protection and preservation of strawberries from injury and damage by heat. The jury returned a verdict for plaintiffs in the sum of $500.

The principal question presented by the assignments of error concerns the validity of this clause of the receipt, namely, "nor in any event shall said company be held liable beyond the sum of fifty dollars, at not exceeding which sum said property is hereby valued." The original common-law rule imposing upon the carrier the liability of an insurer and prohibiting contracts against negligence was based on the public character of the carrier's duties, the inequality in the footing of the carrier and shipper, and the possibilities of collusion between the carrier and a wrongdoer. The principle was to protect the public. As methods and conditions of transportation changed, the very reason of the rule necessitated its alteration so as to permit certain modifications, by contract, of the common-law rule for the mutual advantage of both the carrier and the public. Alair v. N. P. Ry. Co., 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588; Douglas v. T. R. Co., 62 Minn. 288, 64 N. W. 899, 30 L. R. A. 860; O'Malley v. G. N. Ry. Co., 86 Minn. 380, 90 N. W. 974; St. L., I. M. & S. Ry. v. Lesser, 46 Ark. 236; St. L., I. M. & S. Ry. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; Railway Co. v. Spann, 57 Ark. 127, 21 S. W. 914; L. R., M. R. & T. R. R. v. Harper, 44 Ark. 208; L. R., M. R. & T. R. R. v. Talbot, 39 Ark. 523; Pacific Express Co. v. Wallace, 60 Ark. 100, 29 S. W. 32; Railway v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230. And see James Quirk Milling Co. v. Minneapolis & St. L. R. Co., 98 Minn. 22, 107 N. W. 742, 116 Am. St. Rep. 336. The present view of the law is well stated by Mr. Justice McKenna in Cau v. Texas & Pac. R. Co., 194 U. S. 427, 431, 24 Sup. Ct. 663, 664, 48 L. Ed. 1053, as follows: "Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper, and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law."

In the case at bar, four rates were available to the shipper: A merchandise open rate, a strawberry special rate, a stated value rate, and a car load rate. An agent of defendant was, by the dexterity of counsel for plaintiffs, confused as to his testimony on this point. Construing the evidence as a whole, however, we are of opinion that for present purposes the shipper was given sufficient "option and opportunity" to select one of these different rates. The question then arises whether the stipulation for the limitation of the liability of the carrier was just and reasonable in the eye of the law. The shipper was given the standard form of receipt, in which the value was fixed at

$50. He did not by his own act independently determine that sum as the actual value of what he shipped. On the contrary, while he thus assented to a valuation of $50, he agreed to pay, and paid, $330 in freight. There was abundant testimony that the car contained 550 cases of berries, that, if in good condition when delivered, were worth at least $3.75 per case, or about $2,000. In the absence of affirmative proof, we are unable to see how it could be maintained that the rate charged or the exemption provided for was necessarily just and reasonable in the eye of the law. No such proof was offered. The conclusion follows that this clause of the contract was not valid. * * *

HANSON v. GREAT NORTHERN RY. CO.

(Supreme Court of North Dakota, 1909. 18 N. D. 324, 121 N. W. 78, 138 Am. St. Rep. 768.)

FISK, J.[1] * * * The contract in question, therefore, in so far as it does not attempt to limit defendant's liability for loss or damage occasioned by gross negligence, fraud, or willful wrong of itself or its servants, is not contrary to the public policy of this state as expressed in the provisions of the Code above cited; but to the extent, if any, that it attempts otherwise to limit such liability, the same will not be enforced by the courts of this state. The so-called "special contract" is as follows: "Property Release. Consignee and destination, Theo M. Hanson, Tolna, N. D. Description of Articles. 1 lot H. H. goods O. R. Val Rel. to $5.00 per cwt. In consideration of the Great Northern Railway Company having received the above property from Boyd Trf. & Stg. Co. consigned to Theo. M. Hanson for transportation on their line from Mpls. station to Tolna, N. D. I do hereby release the said company, * * * from all liability from * * * loss or damage of whatever kind except such as may occur from negligence of the company by collision of trains or by cars being thrown from the track in course of transportation. And for the further consideration of the lower rate hereby secured, I do hereby declare the value of all property and goods shipped under this contract to be $5.00 per cwt., said lower rate being given by the G. N. Ry. Co. solely upon the basis of said valuation. And in consideration of said reduced rate, I further agree that, in case of loss or damage to said property, or to any part thereof, my recovery for such loss or damage shall not exceed the above valuation. I do also release said company from all loss or damage that may occur to any freight shipped by me, above entered, after it has been unloaded from the cars at Tolna station on their line. [Signed] Boyd Transfer Co., by Anderson."

[1] Part of the opinion is omitted.

It is entirely clear that the first paragraph of said contract, which attempts to exonerate the company from all liability for loss or damage of every kind, except such as may occur from negligence of the company by collision of trains or by cars being thrown from the track, is void both under the common-law rule and the statute of this state, and this is also true with reference to the third paragraph. It remains to consider the validity of that portion of the contract whereby a declared valuation of $5 per hundredweight of the goods in question is set forth, with the agreement that in case of loss or damage to said property, a recovery therefor shall not exceed such declared valuation.

Respecting the validity of such agreed valuation stipulations, there is much diversity of opinion among the courts of this country; but by the weight of authority such stipulations are upheld, provided the same are reasonable in the eye of the law and are fairly and honestly made as a basis for the carrier's charges and responsibilty, even where the loss is caused by the negligence of the common carrier; the theory of such decisions being that such a stipulation or agreement is a just and reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. It is said that such limitations of value in no way exempt the carrier from or limit his liability for negligence; their only effect being to liquidate the amount for which the carrier, in case of loss, shall be answerable, whether through his negligence or otherwise. The leading case upon this subject is Hart v. Penn. R. R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, in which Mr. Justice Blachford used the following language: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to an agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss, and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intended he should assume." The other authorities following the rule of the federal court are too numerous to cite. The following are a few of them: Cau v. Tex. Pac. R. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; Donlon Bros. v. Southern Pac. Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118; Coupland v. Hous. R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Central R. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; Rosenfeld v. Peoria, etc., Ry. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Pac. Express Co. v. Foley, 46 Kan. 457, 26 Pac. 665, 12 L. R. A. 799, 26 Am. St. Rep. 107; Hill v. Boston, etc., R. Co., 144 Mass. 284, 10 N. E. 836; Graves v. Exp. Co., 176

Mass. 280, 57 N. E. 462; Smith v. Am. Exp. Co., 108 Mich. 572, 66 N. W. 479; Alair v. N. P. R. Co., 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588; Murphy v. Wells Fargo & Co. Exp., 99 Minn. 230, 108 N. W. 1070; Starnes v. Louisville, etc., R. R. Co., 91 Tenn. 516, 19 S. W. 675; Richmond, etc., D. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; Ullman v. Chicago, etc., Ry. Co., 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 949.

The rule is announced in many of said authorities that such limitations, in order to be valid, must be made with reference to a value to which the charges and responsibilities of the carrier shall be proportioned. Mere arbitrary limitations or stipulations are not upheld. If it appears that the object of such stipulations is to secure a fair and reasonable value upon which to base the terms of the contract of shipment, they will be sustained; but, on the contrary, if it appears that the purpose was merely to place a limit to the carrier's liability in case of loss or damage to the goods, the same will be held void. Such agreements entered into for the former purpose are held reasonable, but unreasonable if for the latter purpose. The latter is a mere attempt on the part of the carrier to limit his liability for losses caused by his own negligence, and as to losses so caused, such agreements are held unreasonable and void on account of such attempted limitation of liability. Alair v. N. P. Ry. Co., 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588; Ullman v. Chicago, etc., Ry. Co., 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 949; Donlon Bros. v. Southern Pac. Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118. See, also, Chicago N. W. Ry. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. Rep. 587; Rosenfeld v. Peoria, etc., Ry. Co., 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; Gardner v. Southern Ry. Co., 127 N. C. 293, 37 S. E. 328.

The courts are not agreed regarding the test to be applied in determining the validity of such contracts or stipulations; some holding a stipulation void which merely fixes a maximum value on the property limiting recovery in case of loss to a sum not exceeding such amount, upon the ground that a stipulation of this kind is a mere attempt to limit the carrier's liability, and hence is solely in the interest of such carrier. Other courts hold that there is no distinction on principle between such a stipulation and one by which the parties expressly agree to a certain fixed valuation. Among those holding to the former rule are Conover v. Pac. Exp. Co., 40 Mo. App. 31; Kellerman v. Kans. City, etc., Co., 68 Mo. App. 255; St. Louis, etc., R. Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837; Eells v. St. Louis Ry. Co. (C. C.) 52 Fed. 903. Among those holding to the latter rule are Alair v. N. P. R. Co., 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588; Ullman v. Chicago, etc., Ry. Co., 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 949.

While there is some contrariety of opinion also on the question of

the validity of such stipulations, depending upon whether the value is fixed by the shipper himself or inserted by the carrier, under the prevailing rule, no such distinction is drawn. The true test seems to be whether the stipulation was inserted and agreed to in the interest of the carrier for the mere purpose of limiting his liability in case of loss or damage, or whether it was inserted for the purpose of fixing the rate of compensation for the carriage of the property and the proportionate responsibility of the carrier in the performance of the contract of carriage. The Alabama court has adopted another test as to the validity of such stipulations, which is that the value stipulated or agreed upon must not be disproportionate to the actual value of the property. Speaking upon this question in the recent case of Southern Ry. Co. v. Jones, 132 Ala. 437, 31 South. 501, Chief Justice McClellan says: "In determining whether a stipulation is void as being against public policy, there is no room for inquiry into the knowledge, information, or intention of the parties. The question is not what the parties knew or intended, but what is the effect of the stipulation; not whether the parties intended evil or knew their act was hurtful to the public, but whether to allow and uphold such contracts would be fraught with wrong and injury to the people of a character from which it is the province and the duty of the government to protect them. So it is immaterial, when a carrier has stipulated for the limitation of damages resulting from his negligence to a greatly disproportionately small valuation of the property carried, whether he knew or was informed of its real value or not. It is against the public good in respect of a governmental concern that he should be allowed to make such stipulation under any circumstances, and to allow it to stand in any instance or upon any consideration would be to emasculate the principle of public policy obtaining in the premises, and to leave the public exposed to all the uncertainties incident to inquiries into what carriers intended, or knew or had been informed as to the real value of the property transported by them." See, also, to the same effect, the very recent case of South. Exp. Co. v. Owens, 146 Ala. 412, 41 South. 752, 8 L. R. A. (N. S.) 369, 119 Am. St. Rep. 41, 9 Ann. Cas. 1143, where the same court reviews the authorities at length and announces the better doctrine to be that a carrier cannot, by a contract fixing the value of the property carried in relation to the amount of freight paid, limit its liability pro tanto for losses caused by its own negligence.

The doctrine thus announced, however, seems to be opposed to the weight of authority, and we think the sounder rule is that announced in Alair v. N. P. R. Co., 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588; Donlon Bros. v. So. Pac. Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118, and other cases above cited, holding in effect that a mere difference between the value as agreed upon and the actual value of the property, however wide such difference may be, is not a controlling test as to

the validity of such stipulations, and that the true test is whether the stipulation was fairly entered into and is "just and reasonable in the eye of the law." The fixing of a mere arbitrary sum, without any reference to the real value, and merely for the purpose of fixing the limit of the carrier's liability, will not ordinarily be held to be "just and reasonable within the eye of the law." The facts in each case must be looked to to determine whether the object of such stipulation was merely to place a limit on the carrier's liability, and therefore invalid, or whether the object was, as before stated, to fairly and honestly fix a value as a basis of the carrier's charges and responsibility, and hence valid as a "reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

Another line of very respectable authorities adhere to the rule that the carrier will not be permitted, by any contract with the shipper, to limit his liability for loss caused by his negligence to anything less in amount than the actual damage suffered by the shipper. Among the courts so holding are Illinois, Kentucky, Mississippi, Nebraska, Ohio, Pennsylvania, Tennessee, and Texas. The following are a few of the cases: Chicago, etc., Ry. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. Rep. 587; Chicago, etc., Ry. Co. v. Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68 (containing a very valuable and exhaustive note covering every phase of the subject of the limitation of a carrier's liability); Chicago, etc., Ry. Co. v. Witty, 32 Neb. 275, 49 N. W. 183, 29 Am. St. Rep. 436; U. S. Exp. Co. v. Backman, 28 Ohio St. 144; Adams Exp. Co. v. Holmes (Pa.) 6 Sad. 167, 9 Atl. 166; Houston, etc., Ry. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308. For other cases so holding, see above note in 88 Am. St. Rep., at page 112.

We are not required, in the case at bar, to express our views as to which rule announced by the foregoing two lines of authorities is the sounder, for we are agreed that, applying the test adopted by the courts holding to the first rule above stated, the stipulation in question is not "just and reasonable in the eye of the law," and hence is not only contrary to the public policy of this state, but is also contrary to the well-established rule of the common law, and will not be enforced. In the Hart Case, supra, it was said: "The agreement as to value in this case stands as if the carrier had asked the value of the horse, and had been told by the shipper, the sum inserted in the contract." When tested by the rule announced in the Hart Case and other cases holding to the same doctrine, it is apparent that the contract in question cannot be sustained. In the first place, the property consists of household goods, and there is not a scintilla of testimony in the record tending to show their actual value, aside from the plaintiff's testimony at the trial. The cartman in the employ of the storage and transfer company is not shown to have possessed any knowl-

edge of their value whatsoever, nor does it appear that his employer or any of the members of the storage company possessed any such knowledge. It is not contended that either of the parties who were instrumental in making or causing such special contract to be made had any knowledge whatsoever upon the subject of the actual or supposed or the approximate value of the property. The carrier's servant who prepared said contract inserted a mere arbitrary sum of $5 per hundredweight as the value, without any inquiry from any one, or without any investigation with the view of determining the approximate value thereof. It cannot be said respecting household goods, as was said by Judge Mitchell in the Minnesota case, supra, regarding horses, that "every one may be presumed to know approximately the average value." We cannot say, as was said by Judge Mitchell in said case, that we are justified in taking judicial notice of the fact that the maximum value placed by this contract upon these goods is approximately that of average household goods. In view of these facts, how can it be contended that such stipulation is "just and reasonable in the eye of the law"? The most that can be said of it is that is a mere arbitrary fixing of value by the carrier's servant acquiesced in by the transfer company's drayman, who had no knowledge as to the value nor any specific instructions from his employer with reference to fixing value—facts which were or should have been within the knowledge of the defendant's servant.

Our conclusion is that such special contract, under the facts in the case at bar, is void in its entirety, both at common law and under the established rule of public policy of this state, and hence the same cannot avail defendant as a defense to plaintiff's cause of action. This being true, we are not required to notice the other questions raised by appellant.

The judgment and order appealed from are correct, and are, accordingly, affirmed. All concur.

IV. Limitations as to Time of Presenting Claims [8]

SOUTHERN EXPRESS CO. v. CALDWELL.

(Supreme Court of the United States, 1874. 21 Wall. 264, 22 L. Ed. 556.)

Caldwell sued the Southern Express Company in the court below, as a common carrier, for its failure to deliver at New Orleans a package received by it on the 23d day of April, 1862, at Jackson, Tennessee—places the transit between which requires only about one day. The company pleaded that when the package was received "it was agreed between the company and the plaintiff, and made one of the express conditions upon which the package was received, that the company should not be held liable for any loss of, or damage to, the package whatever, unless claim should be made therefor within ninety days from its delivery to it." The plea further averred that no claim was made upon the defendant, or upon any of its agents, until the year 1868, more than 90 days after the delivery of the package to the company, and not until the present suit was brought. To the plea thus made the plaintiff demurred generally, and the Circuit Court sustained the demurrer, giving judgment thereon against the company. Whether this judgment was correct was the question now to be passed on here.

STRONG, J.[9] * * * The question, then, which is presented to us by this record is, whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy.

It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the Statute of Limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and, having made his claim, he may delay his suit.

It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law, and inoperative. Such was our opinion in Railroad Company v. Lockwood [17 Wall. 357, 21 L. Ed. 627]. A common carrier is always responsible for his negligence, no matter what his stipulation may be. But an agreement that in case of failure by the carrier to deliver the goods,

[8] For discussion of principles, see Dobie, Bailm. & Carr. § 134.

[9] Parts of the opinion are omitted.

a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just, as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels easily lost or mislaid, and not easily traced. They carry them in great numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry hundreds, even thousands of packages daily. If one be lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor, the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible, to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers.

Policies of fire insurance, it is well known, usually contain stipulations that the insured shall give notice of a loss, and furnish proofs thereof within a brief period after the fire, and it is undoubted that if such notice and proofs have not been given in the time designated or have not been waived, the insurers are not liable. Such conditions have always been considered reasonable, because they give the insurers an opportunity of inquiring into the circumstances and amount of the loss, at a time when inquiry may be of service. And, still more, conditions in policies of fire insurance that no action shall be brought for the recovery of a loss unless it shall be commenced within a specified time, less than the statutory period of limitations, are enforced, as not against any legal policy. * * *

Our conclusion, then, founded upon the analogous decisions of courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported

to relieve the defendants from no part of the obligation of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days.

It follows that the Circuit Court erred in sustaining the plaintiff's demurrer to the plea. Judgment reversed.

V. Statutory Regulation of Contracts Limiting Liability [10]

ADAMS EXPRESS CO. v. CRONINGER.

(Supreme Court of United States, 1913. 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. [N. S.] 257.)

Mr. Justice LURTON [11] delivered the opinion of the court. The answer relies upon the act of Congress of June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1288), being an act to amend the Interstate Commerce Act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as the only regulation applicable to an interstate shipment; and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the Federal question and gives this court jurisdiction.

Under the law of Kentucky, this contract, limiting the plaintiff's recovery to the agreed or declared value, was invalid, and the shipper was entitled to recover the actual value, "unless," as said in Adams Express Co. v. Walker, 119 Ky. 121, 129, 83 S. W. 106, 67 L. R. A. 412, and affirmed in Southern Express Co. v. Fox & Logan, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270, 133 Am. St. Rep. 241, "sufficient facts are shown, independently of the special contract, to avoid the contract for fraud or to create an estoppel at common law."

The question upon which the case must turn is whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local law of the State, or by the acts of Congress regulating interstate commerce.

That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to

[10] For discussion of principles, see Dobie, Bailm. & Carr. § 135.

[11] The statement of facts and parts of the opinion are omitted.

regulate contracts between the shipper and the carrier of an interstate shipment, by defining the liability of the carrier for loss, delay, injury or damage to such property, needs neither argument nor citation of authority.

But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular State, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the State. Such regulations would fall within that large class of regulations which it is competent for a State to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the State over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected: * * *

The original Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), was extensively amended by the act of June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1288). We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made in section 20, an amendment bearing directly upon the carrier's liability or obligation under interstate contracts of shipment, and generally referred to as the Carmack amendment. * * *

This amendment came under consideration in Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, but the opinion and judgment was confined to that provision of the act which made the initial carrier liable for a loss upon the line of a connecting carrier, the property having been received under a bill of lading which confined the liability of the initial carrier to loss occurring upon its own line.

The significant and dominating features of that amendment are these:

First: It affirmatively requires the initial carrier to issue "a receipt or bill of lading therefor," when it receives "property for transportation from a point in one State to a point in another."

Second: Such initial carrier is made "liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it."

Third: It is also made liable for any loss, damage, or injury to such property caused by "any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass."

Fourth: It affirmatively declares that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Prior to that amendment, the rule of carrier's liability, for an in-

terstate shipment of property, as enforced in both Federal and State courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States, Hart v. Pennsylvania Railroad, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; or that determined by the supposed public policy of a particular State, Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; or that prescribed by statute law of a particular State, Chicago, etc., Railroad v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688.

Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. The situation was well depicted by the Supreme Court of Georgia in Southern Pacific Co. v. Crenshaw, 5 Ga. App. 675, 687, 63 S. E. 865, where that court said:

"Some States allowed carriers to exempt themselves from all or a part of the common law liability, by rule, regulation, or contract; others did not; the Federal courts sitting in the various States were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another. The congressional action has made an end to this diversity; for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the state court's obeying and enforcing the provisions of the Federal statute where applicable to the facts in such cases as shall come before them."

That the legislation supersedes all the regulations and policies of a particular State upon the same subject, results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to

exist. Northern Pacific Ry. v. State of Washington, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237; Southern Railway v. Reid, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257; Mondou v. Railroad, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.

THE COMMENCEMENT AND TERMINATION OF THE LIABILITY OF THE COMMON CARRIER OF GOODS

I. Delivery to, and Acceptance by, the Carrier [1]

TATE et al. v. YAZOO & M. V. R. CO.

(Supreme Court of Mississippi, 1901. 78 Miss. 842, 29 South. 392, 84 Am. St. Rep. 649.)

Action by Tate & Co. and others against the Yazoo & Mississippi Valley Railroad Company. From a judgment in favor of defendant, plaintiffs appeal.

TERRAL, J. The appellee in this case recovered judgment by a peremptory instruction, and the appellants insist that a peremptory instruction should have been given in their behalf. On the 28th of September, 1897, the appellants loaded upon a car of the defendant company at Clacks station 24 bales of cotton. The loading of the car was finished after sundown, and after the local freight train of that day, which was accustomed to take loaded cars from Clacks, had passed on its return trip to Memphis; and no other local freight train, by which alone cotton was shipped from Clacks, would arrive at said station until the evening of the next succeeding day. Early on the morning of the 29th of September the car load of cotton was wholly consumed by fire; and this suit, being a consolidation of five suits, is to recover its value. Tate & Co. operated a public gin at Clacks, where the defendant company had a siding, but it had no station house or agent at that point. Japson and Keesee, who were in charge of Tate & Co.'s gin and plantation at Clacks, testified that when it was desired to ship cotton, one of them would inform the conductor of the local freight train, and the conductor would set out there an empty car for loading; and that when the car was loaded, and ready for transportation, the local freight train desired to take the loaded car would be flagged, and the conductor of it informed that the car was ready for transportation, when the conductor would sign the shipper's loading account, if found correct, and attach the car to his train, and transport it to its destination.

The contention of the appellants is that they had delivered the 24 bales of cotton to the defendant company, and that the cotton was burned while in its custody; that the cotton was actually or constructively delivered to the railway company, and that it is chargeable for

[1] For discussion of principles, see Doble, Bailm. & Carr. §§ 136, 137.

the loss. We think, however, that it is quite clear that the railway company had never come into the possession of the cotton for transportation. The car, it was true, was the car of the company, and it was placed upon the company's siding at Clacks for being loaded, and the cotton was loaded into the car, but no servant of the company had any notice of the car being loaded and ready for shipment. Keesee testifies that his recollection was (the trial being had some time after the loss) that, when the car was loaded, a man was left there with it, with the shipping account filled out, in order to stop the train, and get the conductor's receipt for it. And it appears that the flagging of the local freight train and delivery of the shipper's loading account to the conductor was an essential feature of the shipping of cotton at Clacks. But Japson and others conclusively show that the local freight train for that day had already passed before the car was loaded, and no other train that could have been expected to take the car would come by there until after the car was burned. There was no constructive delivery of the cotton to the railroad company. Its proper servant, the conductor of the local freight train, by which it was desired to have this cotton transported, knew nothing of its being loaded into the car for shipment; and there could be no acceptance of the cotton for shipment without such knowledge, unless, indeed, there had been an agreement between the parties making the mere loading of the car an acceptance of the freight for transportation. But no such agreement was shown; on the contrary, the clear course of dealing between the parties at Clacks showed that the shipper was to flag the proper local freight train, and deliver to the conductor of the train the car to be transported with the shipper's loading account thereof.

A bill of lading is not essential to charge the carrier with the duty of safely transporting the property delivered for carriage, but the doing of the several acts entitling the shipper to a bill of lading is necessary to charge the carrier with the safety of the articles intrusted to him. In this case, according to the course of dealing between the parties, there could have been no delivery of the cotton to the railroad company until it was loaded, and the local freight-train conductor had notice of the items of freight, its destination, and of its readiness for transportation. Parties desiring to hold common carriers to a stricter responsibility than that imposed by the common law should provide therefor by contract; for, unless bound by contract, otherwise a carrier is not responsible for the safety of articles intended for shipment until a delivery of them to him and an acceptance thereof, and there can be no acceptance until he has knowledge of their readiness for transportation and the shipper's desire therefor. Hutch. Carr. c. 4; Schouler, Bailm. c. 3; Ang. Carr. c. 140; 2 Kent, Comm. *608; Railroad Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301, 303.

Affirmed.

ST. LOUIS, A. & T. H. R. CO. v. MONTGOMERY.

(Supreme Court of Illinois, 1866. 39 Ill. 335.)

LAWRENCE, J.[2] This was an action upon the case brought by the appellee against the appellant to recover the value of a quantity of hay burned upon the cars of the appellant. It appears from the evidence that the hay was placed on the platform cars on Friday, and on Saturday morning the conductor of the freight train was about to take it away, when the plaintiff said he did not wish it to go until he could see Mr. Ketchum, to whom he had sold it. In consequence of his request the cars were left, and the next day the hay was ignited by sparks thrown from the locomotive of a passing passenger train, and a considerable portion was consumed. The plaintiff recovered a verdict on the trial, and the defendant appealed.

There is nothing in the record showing carelessness on the part of the appellant, except the single fact of leaving the hay standing upon the side track exposed to the sparks of a passing train, and this carelessness and exposure resulted from the express request of the plaintiff. It was the unquestionable duty of the railway company to send off the hay as soon as it was placed upon the cars, and this duty they were about to perform, and refrained from its performance solely at the request of the plaintiff himself. When he objected to having the hay go forward, he knew its exposed position, and to what dangers it was liable. These dangers having been incurred at his own request, with full knowledge of their character, and the company having been guilty of no other negligence by which the hazard to the hay was increased, there is no principle of law which will enable this plaintiff to charge the appellant with the consequences of an accident due only to himself. The proof shows that the locomotive was equipped with the best apparatus for arresting sparks, that the passenger train stopped on Sunday at its proper place, and that the engineer, in passing the hay, closed the damper of his locomotive for the purpose of aiding in arresting the sparks. There is no evidence in the record showing that the platform cars on which the hay was loaded could have been taken to any place on the side track where the hazard from passing trains would have been diminished.

Neither can the company be made responsible through its liability as a common carrier. A common carrier, it is true, is liable for all losses not arising from the "act of God," or the public enemy, in neither of which categories would the loss, in the case before us, fall. But the technical liability of a common carrier does not attach until the delivery to him of the property is complete. If, for example, the same person is common carrier and warehouseman, and he receives goods to be forwarded when he has orders from the owner, his liability in the meantime is that of a warehouseman, and not that of a

[2] Part of the opinion is omitted.

common carrier. He must exercise reasonable care, but he is not an insurer against all losses except those arising from the "act of God" and the public enemy. Angell on Carriers, § 134, and cases there cited. That was, in principle, the position of the defendants in the present case. They had received the goods and placed them on a car, and the plaintiff, with full knowledge of the risks to which they might be exposed from passing trains, requested that they should not be forwarded until he had seen Ketchum. From the moment that request was made, and while the defendants were detaining the hay in consequence of it, they were only liable for losses which might have been guarded against by the exercise, on their part, of ordinary care and diligence. The mere leaving of the goods when the plaintiff requested they might be left, and subject to no more hazards than the plaintiff knew they must be subject to, is certainly not a want of care for which the defendants can be held chargeable. * * * Judgment reversed.

GREEN v. MILWAUKEE & ST. P. R. CO.

(Supreme Court of Iowa, 1874. 38 Iowa, 100.)

Action to recover the value of a trunk and contents of clothing alleged to have been lost or destroyed while in possession of defendant as a carrier. There was a trial to a jury, and a verdict rendered against plaintiff under an instruction of the court to the effect that there was no evidence showing that the trunk was delivered to defendant or its agents. From a judgment rendered upon this verdict plaintiff appeals.

BECK, C. J. The evidence discloses the fact that plaintiff, desiring to take passage by an early morning train on defendant's road at Boscobel, in the State of Wisconsin, for Decorah, sent her trunk the evening before by a drayman to defendant's depot. It was left by the drayman in the waiting-room, and as there were no employees of defendant about the premises, no notice thereof was given to any one. This was after business hours in the evening. It was shown that plaintiff had quarterly, for three years, been in the habit of making the same journey she was about to take, and had always sent her trunk the evening before, as she did in this case, and that other travellers were in the habit of doing the same thing when they went by the early train. The drayman testified that he had often left baggage at the depot under similar circumstances, but that his custom was to notify the depot agent or servant of defendant.

Upon this evidence the court directed the jury that there was no proof of the delivery of the trunk to defendant or its servants.

It is not claimed that defendant would be liable without a delivery, either actual or constructive, of the property to its agent or servant. That a delivery may be made at the proper place of receiving such

baggage under the express assent or authority of the carrier, without notice to its employees will not, we presume, be disputed. It is equally clear upon principle that this assent may be presumed from the course of business or custom of the carrier. Upon evidence of this character contracts based upon business transactions are constantly established. The citation of authority is not required to support this position. See Merriam v. Hartford & N. H. R. R. Co., 20 Conn. 354, 52 Am. Dec. 344.

The instruction which is the foundation of plaintiff's objection directs the jury that there was no evidence of a delivery of the trunk to the defendant. In this we think there is error. There was evidence tending to show a course of business on the part of defendant, a custom, to receive baggage left at the station house, as in this case, without notice to plaintiff's servants. Upon evidence of this character, it was proper that the facts should have been left to the determination of the jury, whether there had been a delivery of the property within the rules above announced—whether a course of business, a custom, had been established, to the effect that a delivery of baggage at the station house without notice, was regarded by the defendant as a delivery to its servants, and whether plaintiff's trunk was received under this custom. It is a well-settled rule that the courts cannot determine upon the sufficiency of evidence to authorize a verdict where there is a conflict, or some evidence upon the whole case. In such a case an instruction to the effect that there is no evidence, and directing a verdict accordingly, is erroneous. Way v. Illinois Cent. R. R. Co., 35 Iowa, 585.

The judgment of the district court is reversed, and the cause remanded.

II. Bills of Lading[3]

FORBES v. BOSTON & L. R. CO.

(Supreme Judicial Court of Massachusetts, 1882. 133 Mass. 154.)

MORTON, C. J.[4] The first case is an action of tort, containing a count for the conversion of a quantity of corn. * * * On or about October 20, 1879, Gallup, Clark & Co., grain dealers in Chicago, in response to an order from Foster & Co., forwarded to Boston 50 car loads of corn, by the National Dispatch Fast Freight Line, which is an association of several railroad companies, whose roads made a continuous line from Chicago to Boston, the defendant's road

[3] For discussion of principles, see Doble, Bailm. & Carr. § 138.

[4] Parts of the opinion are omitted.

being a part of the line. Upon the shipping of the corn, an inland bill of lading was issued, by which it was consigned to the order of Gallup, Clark & Co., at Boston. Gallup, Clark & Co. drew a draft upon Foster & Co. for the price of the corn, attached to it the bill of lading, and forwarded both to the Tremont National Bank of Boston. On October 24, 1879, Foster & Co. paid to the bank the amount of the draft, and the draft and bill of lading were delivered to them. Immediately upon obtaining the draft and bill of lading, Foster & Co. indorsed them to the plaintiffs, as security for an advance then made by the plaintiffs to the full amount of the draft, and they have held them ever since. The corn mentioned in the bill of lading was received and transported by the defendant, arriving in Boston on October 30, 1879. It remained in its cars until December 12, 1879, when by the orders of Foster & Co. it was shipped on board a vessel for Cork, and exported to Ireland. Foster & Co. did not produce and present to the defendant the bill of lading, but represented that it was in their possession.

Upon these facts, it is too clear to admit of any doubt that, by the transfer of the draft and bill of lading by Foster & Co. to the plaintiffs, the title and property in the corn passed to them. The bill of lading, though not strictly a negotiable instrument, like a bill of exchange, was the representative of the property itself. It was the means by which the property was put under the power and control of the plaintiffs, and the delivery of it was for most purposes equivalent to an actual delivery of the property itself.

The transaction between Foster & Co. and the plaintiffs was not in form or in effect a mortgage, so that, as contended by the defendant, it must be recorded in order to have validity. It was a transfer and delivery of the property. The clear intent of the parties was that the property in the corn should pass to the plaintiffs as security for the advance made by them. Whether they took an absolute title with a liability to account for the proceeds, or a title as pledgees, is not material, as all the authorities show that they took either a general or a special property in the corn, which entitles them to recover of any one who wrongfully converts it. De Wolf v. Gardner, 12 Cush. (Mass.) 19, 59 Am. Dec. 165; Cairo National Bank v. Crocker, 111 Mass. 163; Green Bay National Bank v. Dearborn, 115 Mass. 219, 15 Am. Rep. 92; Chicago National Bank v. Bayley, 115 Mass. 228; Hathaway v. Haynes, 124 Mass. 311; Gibson v. Stevens, 8 How. 384, 12 L. Ed. 1123; Dows v. National Exchange Bank, 91 U. S. 618, 23 L. Ed. 214. Numerous other cases might be cited.

The delivery of the bill of lading was in law the delivery of the property itself, and it was not necessary that the plaintiffs should take immediate possession of it upon its arrival, or that they should give notice to the carrier or warehouseman who held the property. Farmers' & Mechanics' National Bank v. Logan, 74 N. Y. 568; The Thames, 14 Wall. 98, 20 L. Ed. 804; Meyerstein v. Barber, L. R.

2 C. P. 38, 661; Id., L. R. 4 H. L. 317. It is true that the plaintiffs might by their subsequent laches defeat their right to assert their title. If they permitted the property to remain under the control of their assignors, and held them out to the world as having the right to deal with the property, they might be estopped from setting up their title. But the authorities are decisive to the point that, by the transfer from Foster & Co., they took a title as purchasers of the corn which entitles them to maintain this action, unless they have lost the right by their laches, upon proving a conversion by the defendant.

The next question is whether there was a conversion by the defendant. It is settled that any misdelivery of property by a carrier or warehouseman to a person unauthorized by the owner or person to whom the carrier or warehouseman is bound by his contract to deliver it, is of itself a conversion, which renders the bailee liable in an action of tort in the nature of trover, without regard to the question of his due care or negligence. Hall v. Boston & Worcester Railroad, 14 Allen (Mass.) 439, 92 Am. Dec. 783. By the bill of lading, and by the waybill which was sent to the defendant in the place of a duplicate bill of lading, the corn was to be delivered to the order of Gallup, Clark & Co. The defendant contracted to deliver it to such person as Gallup, Clark & Co. should order, and could not without violating its contract deliver it to any other person. By delivering it to Foster & Co., therefore, the defendant became liable for a conversion, unless it shows some valid excuse. Newcomb v. Boston & Lowell Railroad, 115 Mass. 230; Alderman v. Eastern Railroad, 115 Mass. 233. The record before us does not show any laches or any act of the plaintiffs which can excuse or justify this misdelivery. They did not hold Foster & Co. out to the world or to the defendant as one entitled to control the property. Indeed, it is admitted that the defendant did not know, until long after the delivery, that the plaintiffs had any connection with the property, or with Foster & Co. The plaintiffs did nothing to mislead the defendant. They had the right to rely upon the facts that they held the bill of lading, and that, according to the ordinary course of business, the goods could not be obtained except upon its production. The defendant saw fit to deliver them to Foster & Co. without requiring them to produce the bill of lading, relying upon their representation that they were the holders of it. It took the risk of their truthfulness, and cannot now shift that risk upon the plaintiffs, who have done nothing to mislead or deceive the defendant. We are, for these reasons, of opinion that the defendant is liable for the value of the corn described in the first count of the declaration. * * *

III. Delivery by the Carrier to the Proper Person [5]

PACIFIC EXPRESS CO. v. SHEARER et al.

(Supreme Court of Illinois, 1896. 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177 and note, 52 Am. St. Rep. 324.)

Action by W. W. Shearer and others against the Pacific Express Company. From a judgment of the appellate court reversing a judgment for defendant (43 Ill. App. 641), it appeals.

Appellees had, for a number of years prior to the happening of the circumstances giving rise to this case, conducted business at the stock yards in Chicago under the firm name of W. W. Shearer & Co. For some time prior to April 22, 1889, said firm had dealings with one J. C. Stubblefield, who was engaged in buying stock in Kansas, Missouri, and Texas, and who from time to time applied to Shearer & Co. for advance of money, which they sent him in form of drafts, letters of credit, and money by express. In April, 1888, J. C. Stubblefield was at Chetopa, in Kansas, and telegraphed appellees for $700, and it was sent to him in draft, and he was there identified at the bank, and received the money for the draft. Stubblefield was acting for himself in the purchase of cattle, and not as an agent for appellees. On April 21, 1889, about midnight, this J. C. Stubblefield arrived in Chetopa, Kan., from Texas. He got off the train, and went to an hotel, a short distance from the depot, but did not register his name at the hotel, giving as a reason that he was tired, and desired to go to bed. At the same time, and from the same train, another man got off at Chetopa, and went to another hotel in the town, further away from the depot than that to which J. C. Stubblefield went. This man claimed to be named J. C. Stubblefield. The real J. C. Stubblefield, the next morning, met with an acquaintance in the town, and took a ride with him in a buggy, and some time during the afternoon left Chetopa, on a freight train for Parsons, and went from there to Coffeyville. The other man, whom we shall designate as the "impostor," went to the telegraph office in Chetopa, and sent the following telegram: "Chetopa, Kansas, April 22, 1889. To W. W. Shearer & Co., Union Stock Yards, Chicago: Express me $4,000 to-day; Chetopa. Answer. J. C. Stubblefield."

The impostor had not registered at the hotel at which he stopped, which was kept by Mr. Davenport. After having sent the above telegram to the appellees, he returned to the hotel, and said: "Mr. Davenport, if a telegram should come here to J. C. Stubblefield, if there are any charges on it, you pay it, and I will settle with you." Mr. Daven-

[5] For discussion of principles, see Dobie, Bailm. & Carr. § 141.

port asked him if that was his name, and he replied in the affirmative. Davenport then informed him that a messenger boy had been there with a telegram for J. C. Stubblefield, and told him where he could find the boy. Soon after, the impostor informed Davenport that he had received the telegram. This telegram was the answer from W. W. Shearer & Co. to the message sent them in the morning, and was as follows: "Union Stock Yards, Chicago, Ill., 22. To J. C. Stubblefield: Sent money as ordered to-day. Wire me full particulars on receipt of this. W. W. Shearer." In reply, the impostor sent the following: "Chetopa, Kansas, 22. To W. W. Shearer & Co.: Bought 240 corn-fed Texans, top of 300, at $20 a head. J. C. Stubblefield."

During the afternoon of April 22d, the impostor had given orders to the railroad company for 11 stock cars to be set on the track for his use, for the purpose of carrying cattle to be shipped by him on the 24th of April. The cars were ordered from the railroad company in pursuance of such arrangement, and were by the company placed on the side track at Chetopa, ready for the use of the man known to them as Stubblefield. He informed Davenport that he was buying cattle to ship from Chetopa, and that he was expecting money from Chicago with which to pay for them; that he ordered the money from plaintiffs by telegraph. On the morning of the 24th, he called on the agent of the appellant express company, and asked if there was a package there for Stubblefield. The agent asked him if his name was Stubblefield, to which he replied, "It is." Being asked what were his initials he replied, "J. C." The agent then said there was a package for J. C. Stubblefield, and asked, "What identification have you?" He then took from his pocket two accounts of sales and a telegram, and handed them to the agent. The telegram was the one signed by Shearer & Co., and addressed to J. C. Stubblefield, at Chetopa, a copy of which is above set out. The accounts of sales show transactions between J. C. Stubblefield and appellees, wherein appellees have sold, in Chicago, cattle consigned to them by J. C. Stubblefield. The agent then asked the impostor, "Is there anybody here with whom you are acquainted?" to which he replied, "Nobody except the landlord." The impostor then brought in Davenport, the landlord, and stated that he came after the package. The agent inquired of Davenport if he was acquainted with this man. Davenport said, "I am." The agent then asked: "Who is he? What is his name?" Davenport replied, "J. C. Stubblefield." The agent asked, "How do you know that is his name?" Davenport said: "At least, that is the only name I ever knew him by. Besides, he has been stopping at my house several days, nearly a week. He is also on the trade with some parties west of the town for some stock. He has got the cars ordered. They are now on the track at the depot." The agent then asked the impostor, "What are you looking for?" He said, "A package of money." The agent asked, "How much?" He answered, "$4,000, from W. W. Shearer & Co., Chicago, Ill." The agent then delivered the package

of money to the impostor, he receipting for it in the name of J. C. Stubblefield, and Davenport signing his own name as identifying Stubblefield. The impostor then directed Davenport to retain a room for him, as he would be back that night, and took a train for Coffeyville, and was not thereafter seen in Chetopa. The genuine J. C. Stubblefield left Coffeyville on April 24th, and came to Chicago, where he at once called at the office of the appellees; and it was then discovered that a trick had been played, and steps were taken by Shearer and Stubblefield to stop the payment of the money, but it was then too late.

CRAIG, C. J.[6] (after stating the facts). * * * It is apparent from the record that the package was delivered to the person in response to whose telegraphic order appellees sent the package, appellees at the time believing such person to be J. C. Stubblefield; and it is no doubt also true that at the time of delivery the agent of appellant ascertained that the person who demanded the package, and to whom it was delivered, was the person in response to whose order appellees sent the same; that appellees acted on the order for the money as the order of J. C. Stubblefield; and it may also be true that the agent used reasonable diligence to ascertain the identity of the person who demanded the package before it was delivered. Would these facts relieve the carrier of liability from delivering the package to a person to whom it was not consigned?

In Hutchinson on Carriers (section 344) the rule with reference to delivery is stated as follows: "No circumstance of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proofs of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned."

In Express Co. v. Hutchins, 67 Ill. 349, where an action was brought against the express company for its failure to deliver a package of money left with it to be carried and delivered for him, this court said, in regard to the liability of the company: "They became insurers for its safe delivery. Being so, nothing can excuse them from their obligation safely to carry and deliver but the act of God or the public enemy. This rule of the common law, the rigid application of which has given so much satisfaction and security to the commerce of nations, is properly invoked in cases like this."

[6] Part of the opinion of Craig, C. J., and the entire dissenting opinion of Phillips, J., are omitted.

In Baldwin v. Express Co., 23 Ill. 197, 74 Am. Dec. 190, where an action was brought against the company to recover the value of a package of money which it, as common carrier, undertook to carry from Chicago to Madison, Wis., and deliver to a certain named person, it was held to be the settled doctrine of England and this country that there must be an actual delivery to the proper person, and in no other way can the company discharge itself of responsibility as a common carrier except by proving that it has performed such engagement, or has been excused from the performance of it, or been prevented by the act of God or public enemy. After citing authorities in support of this position, it is said: "It is necessary, in order to give one security to property, this rigid rule should obtain, and it has for years been enforced against common carriers. They are considered as insurers and are under that responsibility." In Gulliver v. Express Co., 38 Ill. 503, the rule announced in the case last cited was sanctioned and approved.

In Express Co. v. Milk, 73 Ill. 224, where an action was brought against the company to recover for a package of money delivered to the company in Du Page county, to be forwarded to Kankakee, when the package arrived at its destination the agent of the company delivered it to a certain person, on a forged order of the consignee. It was held that it was the duty of an express company, upon receiving a package of money to be forwarded, to safely carry and deliver it to the consignee; and the only way it can relieve itself from the responsibility as a common carrier is by showing performance or its prevention by the act of God or the public enemy. It is not discharged by delivering the same to another on a forged order of the owner. The same doctrine is announced in Express Co. v. Wolf, 79 Ill. 430.

The decisions of this court are believed to be in harmony with the law as declared in the text-books, and as announced by a large majority of the courts of last resort of the country. The law requires, at the hands of the carrier, absolute certainty that the person to whom the delivery is made is the real person to whom the goods have been consigned, and the carrier cannot escape liability on the ground that deception, imposition, or fraud may have been resorted to by an impostor to obtain from the agent of the carrier the goods intrusted to his care. The business interest of the country, as well as the rights of a consignor, who pays a liberal price for the transmission of his property, alike demand that the carrier should be held to a strict accountability.

There are a number of cases in the books where a delivery of goods has been made by the carrier to the wrong person, under circumstances not unlike the facts under which the money was delivered here, where the carrier was held liable. In Express Co. v. Fletcher, 25 Ind. 493, a person pretending to be J. O. Riley called on the telegraph operator and agent of the express company, and sent a telegram to plaintiff, requesting a certain sum of money by express. In a short

time, the same agent received, by express, a package of money addressed to J. O. Riley. The person who had sent the telegram for the money called on the agent and operator, and demanded the package of money, which was delivered over to him. Subsequently it turned out that the person who sent the telegram and to whom the money was delivered was not J. O. Riley, and the express company was held liable for the money. In the decision of the case, the court, among other things, said: "The express undertaking of the appellant was to deliver the package to J. O. Riley in person. The utmost that the answer alleged was that the delivery was to another person, who pretended to be Riley. He identified himself merely as having so pretended on the day before, by transmitting a telegram in Riley's name. This was no better evidence that his name was Riley than if he had so stated to the express agent or any third person. That the package had been sent in response to a telegram purporting to be from J. O. Riley simply proved that Riley had credit or some arrangement with the plaintiff to furnish him money, and that the package was sent to him, not that he was the person who sent the dispatch, or that any one pretending to be him was to receive it." * * *

Another case relied upon is Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467. This case, on its facts, is more like the one under consideration than any that have been cited by appellant, and it seems to sustain the position of appellant; but, while we recognize the ability of the court in which the case was decided, we do not regard the rule laid down as the correct one, and we are not inclined to follow it.

Some other cases have been cited in the argument of counsel, but it will not be necessary to refer to them here. The cases bearing on the question are not entirely harmonious, but the rule adopted in this state and in the courts of many other states, that the carrier is an insurer for the safe delivery of the goods to the person to whom they are consigned, is, as we think, the only safe rule to be adopted. This rule gives protection to the consignor, who pays his money to the carrier to transport and deliver goods to the consignee, and at the same time imposes no unreasonable responsibility on the carrier. When goods or money has been delivered to a carrier, to be carried and delivered to a certain named person, when the goods reach their destination it is the business of the agent of the carrier to deliver to the real person to whom the goods are consigned; and, as said by Hutchinson, no circumstance of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. Where the consignee is unknown to the agent of the carrier, it is his duty to hold the goods until the consignee furnishes ample proof that he is the person to whom the goods were consigned. When Shearer & Co. received the telegram from J. C. Stubblefield, and forwarded a package of money directed to J. C. Stubblefield, they supposed and believed the order came from the man with whom they had personally had dealing, and the man of that name with whom they were per-

sonally acquainted; and, when they delivered the package to the carrier, it was consigned to him. The fact that an impostor had sent a telegram in the name of J. C. Stubblefield, and a reply to J. C. Stubblefield was returned, which was delivered to the impostor, did not justify the agent of the carrier to deliver the package directed to J. C. Stubblefield to an impostor representing that he was J. C. Stubblefield. Here the package of money was consigned to J. C. Stubblefield. The carrier was directed to deliver the money to him, and to him only. This was not done. The money was never delivered to J. C. Stubblefield, but the agent of the carrier delivered it to an impostor; and for a failure to deliver the package to J. C. Stubblefield the carrier is liable.

The judgment of the appellate court will be affirmed. Affirmed.

* * * * * * * * * *

IV. Delivery by Express Companies[7]

BULLARD v. AMERICAN EXPRESS CO.

(Supreme Court of Michigan, 1895. 107 Mich. 695, 65 N. W. 551, 33 L. R. A. 66, 61 Am. St. Rep. 358.)

Action by Chandler E. Bullard, survivor of himself and Zenas H. Bullard, late copartners, against the American Express Company for damages for defendant's refusal to call for and deliver packages at plaintiff's place of business. Judgment for defendant, and plaintiff brings error.

MONTGOMERY, J. This is an action in case, commenced in justice court. The declaration, in substance, alleges that plaintiff is a large shipper of celery by express from Kalamazoo to places throughout the United States, upon lines of the defendant, a common carrier; that the defendant, to collect celery and other articles for shipment in the city of Kalamazoo, and to deliver packages received by it, maintains and employs a large number of men, horses, and wagons; that since December 1, 1893, plaintiff's place of business has been at No. 506 Douglas avenue, in said city; that during the celery season plaintiff makes large daily shipments over defendant's lines, and has consigned to him packages of money in payment of celery shipped C. O. D., and other articles, of all of which defendant had notice; that plaintiff repeatedly requested defendant to call at his place of business for his shipments, and to deliver packages to him, which defendant refused

[7] For discussion of principles, see Dobie, Bailm. & Carr. § 143.

to do; that defendant collects for shipment and delivers to a large number of shippers of celery and other articles, under substantially the same circumstances, condition, and situation as the plaintiff, and for shippers at a greater distance from its place of business than plaintiff's place, and for shippers in the same locality as the plaintiff, and has unlawfully discriminated against the plaintiff by such refusal; that plaintiff has been damaged by being compelled to convey his celery to defendant's office for shipment, and procure his packages from its office. The plaintiff had judgment in the justice court. In the circuit court, the court directed a verdict for the defendant.

The evidence on the trial showed that the defendant's agents, acting in unison with the agents of other express companies, had established limits in the city, beyond which they did not go to receive goods for shipment or to deliver packages. In some instances these limits extended a greater distance from the defendant's office than plaintiff's place of business. It was also in evidence that plaintiff knew of these limits before moving into his present place of business, and before transacting the business with defendant in which the inconvenience arose which, it is alleged, caused damage to plaintiff. At the common law, a carrier of goods was not bound to accept delivery at any place other than his place of business, or the line of travel, in the absence of the custom of receiving goods at other places. Hutch. Carr. §§ 82, 87; Blanchard v. Isaacs, 3 Barb. (N Y.) 388.

But it is insisted that the defendant in this case, having practiced the custom of receiving goods for shipment at other points in the city than its office, was bound to furnish equal facilities to all shippers who occupy a similar position. We are not impressed with the force of this reasoning, as applied to the facts in this case. We are cited to no case in which it has been held that a carrier is bound to go beyond its line to receive goods, and, while it would not be competent for a common carrier to discriminate against shippers within its fixed limits, it is not perceived why, if the company is entitled to limit its receipt of goods to its own office or place of business, it may not enlarge these limits at its discretion, without being bound to go beyond them. The duty to deliver to the consignee is somewhat broader. Carriers on land, receiving packages, were, at the common law, generally bound to deliver to the consignee, at his residence or place of business. This rule has not been applied to carriers by water, or railroad companies, which must, of necessity, be confined to a fixed route. It has been said, however, that express companies owe their origin to this very fact, and that the nature of their business is to furnish a means of transportation and delivery to the consignee. Hood's Brown, Carr. § 230; Hutch. Carr. § 379.

The question of how far this duty may be escaped by usage is not well settled. It has been held, however, that, when the business of an office is so small that the company cannot or does not keep a messenger to make personal delivery, it is not unreasonable to require the consignee to call at the office. Hutch. Carr. § 380. If this may be done, it would seem to follow that the company may, so long as the public have notice of the custom, fix limits beyond which its agents are not required to go for delivery. If it cannot do this, it is difficult to say where would be the limit. It is clear that a reasonable limit is not in all cases the city limit. Conditions are often varied. If not the city limit, can it be said that a certain number of miles from the office, in either direction, would be a reasonable limit? We think, where the company, in apparent good faith, has assumed to fix limits, having regard to the public requirements, that, with regard to persons who have dealt with them, having knowledge of this fact, they are not bound to deliver beyond these limits. We do not determine what the right of one not having knowledge of these limits would be. This is not such a case, but in this case we think the court committed no error in directing a verdict for the defendant. Judgment will be affirmed.

V. Connecting Carriers [8]

MUSCHAMP v. LANCASTER & P. J. RY. CO.

(Court of Exchequer, 1841. 8 Mees. & W. 421.)

Lord ABINGER, C. B.[9] The simple question in this case is, whether the learned judge misdirected the jury in telling them that if the case were stripped of all other circumstances beyond the mere fact of knowledge by the party that the defendants were carriers only from Lancaster to Preston, and if, under such circumstances, they accepted a parcel to be carried on to a more distant place, they were liable for the loss of it, this being evidence whence the jury might infer that they undertook to carry it in safety to that place. I think that in this proposition there was no misdirection. It is admitted by the defendants' counsel that the defendants contract to do something more with the parcel

[8] For discussion of principles, see Doble, Bailm. & Carr. § 145.

[9] The statement of facts and the opinions of Gurney, B., and Rolfe, B., are omitted.

than merely to carry it to Preston; they say the engagement is to carry to Preston, and there to deliver it to an agent, who is to carry it further, who is afterwards to be replaced by another, and so on until the end of the journey. Now that is a very elaborate kind of contract; it is in substance giving to the carriers a general power, along the whole line of route, to make at their pleasure fresh contracts, which shall be binding upon the principal who employed them. But if, as admitted on both sides, it is clear that something more was meant to be done by the defendants than carry as far as Preston, is it not for the jury to say what is the contract, and *how much* more was undertaken to be done by them? Now it certainly might be true that the contract between these parties was such as that suggested by the counsel for the defendants; but other views of the case may be suggested quite as probable; such, for instance, as that these railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line, to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last. The fact that, according to the agreement proved, the carriage was to be paid at the end of the journey, rather confirms the notion that the persons who were to carry the goods from Preston to their final destination were under the control of the defendants, who consequently exercised some influence and agency beyond the immediate terminus of their own railway. Is it not then a question for the jury to say what the nature of this contract was; and is it not as reasonable an inference for them to draw, that the whole was one contract, as the contrary? I hardly think they would be likely to infer so elaborate a contract as that which the defendants' counsel suggests; namely, that as the line of the defendants' railway terminates at Preston, it is to be presumed that the plaintiff, who intrusted the goods to them, made it part of his bargain that they should employ for him a fresh agent both at that place and at every subsequent change of railway or conveyance, and on each shifting of the goods give such a document to the new agent as should render him responsible. Suppose the owner of goods sent under such circumstances, when he finds they do not come to hand, comes to the railway office and makes a complaint, then, if the defendants' argument in this case be well founded, unless the railway company refuses to supply him with the name of the new agent, they break their contract. It is true that, practically, it might make no great difference to the proprietor of the goods which was the real contract, if their not immediately furnishing him with the name would entitle him to bring an action against *them.*

But the question is, why should the jury infer one of these contracts rather than the other? which of the two is the most natural, the most usual, the most probable? Besides, the carriage-money being in this case one undivided sum rather supports the inference, that although these carriers carry only a certain distance with their own vehicles, they make subordinate contracts with the other carriers, and are partners inter se as to the carriage-money,—a fact of which the owner of the goods could know nothing; as he only pays the one entire sum at the end of the journey, which they afterwards divide as they please. Not only, therefore, is there some evidence of this being the nature of the contract, but it is the most likely contract under the circumstances; for it is admitted that the defendants undertook to do more than simply to carry the goods from Lancaster to Preston. The whole matter is therefore a question for the jury, to determine whether the contract was on the evidence before them. With respect to the case referred to, of the booking-office in London, it only goes to show that when persons take charge of parcels at such an office they merely make themselves agents to book for the stage-coaches. You go to the office and book a parcel; the effect of this is to make the booker your agent, instead of going to the coach-office yourself; and so that he sends the parcel to the proper coach-office, and once delivers it there, he has discharged himself; he has nothing to do with the *carriage* of the goods. In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which, prima facie, must be made, of the defendants having undertaken to carry the goods the whole way. The taking charge of the parcel is not put as *conclusive* evidence of the contract sued on by the plaintiff; it is only prima facie evidence of it; and it is useful and reasonable for the benefit of the public that it should be so considered. It is better that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind inter se, and should be taken each to have made the others their agents to carry forward.

JOHNSON et al. v. TOLEDO, S. & M. RY. CO.

(Supreme Court of Michigan, 1903. 133 Mich. 596, 95 N. W. 724, 103 Am. St. Rep. 464.)

Action by Charles A. Johnson and others against the Toledo, Saginaw & Muskegon Railway Company. From a judgment in favor of defendant, plaintiffs bring error.

HOOKER, C. J.[10] The plaintiffs have appealed from a verdict directed in favor of the defendant. They were copartners engaged

[10] Parts of the opinion have been omitted.

in the business of buying and shipping fruit at Sparta. On September 25th the defendant sent to Sparta two refrigerator cars for their use, each car being furnished with 2,000 lbs. of ice, at Greenville, 26 miles distant. Plaintiffs began loading these cars the same afternoon, and finished the next morning by 9 o'clock. After the loading, and before the cars left Sparta, they accepted from the defendant's agent at Sparta the bills of lading which are claimed to constitute the contract between the parties. One of these cars was billed to Columbus, Ohio, the other to Indianapolis, Ind. When the cars reached their respective destinations, it was found that the fruit had become heated and injured, and this action was brought to recover damages resulting therefrom. The following is a copy of the bill of lading for one of the cars, and the other is similar, except as to destination:

"Grand Trunk Railway System Bill of Lading.

"Chas. M. Hays, General Manager.

"Sparta, Mich., Station, Sept. 26, 1900.

"Received from C. A. Johnson & Co., by the T. S. & M. Ry., in apparent good order (or as noted) the property described below (contents and value of package unknown) marked and consigned as per margin, and subject to carriers' liability under the common law and statutes in force in the various States, Territories, provinces or foreign countries through which the goods may pass.

"This bill of lading to be presented by consignee without alteration or erasure. If the property is not removed by the consignee within twenty-four (24) hours after reaching destination, it will be retained in car or otherwise stored at owner's risk subject to charge for use of said car or other storage; same, together with transportation charges, shall be a lien on the property.

"Any overcharge occurring on this bill of lading will be promptly adjusted.

"This Bill of Lading contracts rates from Sparta to Columbus Ohio, via ———, at ——— per ——— and charges advanced at $———.

Marks, Consignee, etc.	Articles	Weight Subject to Correction
C. A. Johnson & Co. Indianapolis Ind.	300 Bu. Peaches	
N. Y. D. R. L. No. 13,520 Via Big 4.	O. R. Chgs. Gtd.	15,000 pounds.

"Ice at Greenville and re-ice as often as necessary to keep car thoroughly iced. R. D. Bancroft, Agent."

* * * * * * * * *

It was admitted by defendant that the contract bound it to take these cars to Detroit and Grangers respectively. The plaintiffs

claimed that defendant was liable for the loss, because (1) it was due to its negligence, the cars not being properly iced at Greenville before being sent to Sparta, and a delay occurring between Greenville and Grangers. (2) "If any part of the loss was due to negligence of connecting roads, the defendant is liable therefor under the terms of the contract made, i. e., the bills of lading used, and the attending circumstances."

We are of the opinion that the learned circuit judge was incorrect in saying that a through contract to transport to Columbus was not made by the defendant. If the provisions of the bill of lading ought not to be construed as showing such an intention, in view of the statement that the property was received "subject to carriers' liability, under the common law and statutes," etc., we should not overlook the fact that it contained some other provisions giving rights to and imposing obligations upon both parties. Among these there are some which should be given little weight as evidence showing a through contract, though all may be consistent with such a contract. The provision regarding re-icing, however, is a significant one. There is nothing in the bill of lading, or proof, to show authority on the part of the agent or defendant company to bind connecting lines to "re-ice the car, as often as necessary to keep the car thoroughly iced," yet it is evidently intended as a stipulation. It is contained in a receipt given to one shipping to a designated point by various lines stipulated. It is said that it only states a common-law liability of all roads. But does it not do more than state such a liability? The common law undoubtedly requires care in transporting perishable goods, and, under modern methods, we have no doubt that it would be held to extend to proper refrigeration, according to established custom. Was not the shipper given to understand that his car would at all times be kept thoroughly iced, whether essential to the preservation of the fruit or not, thus providing additional assurance of safety? If this was not the intention, the provision was superfluous.

To whom did the plaintiffs have a right to look for the performance of this engagement? There is nothing on the face of the record to establish privity between plaintiffs and connecting lines as to this provision. There might be privity under another construction of this writing, but only to the extent of the ordinary obligations arising out of the reception of the car as a common carrier. This defendant, if any one, made this promise, and against it, only, could it be enforced according to its terms. * * *

MOORE v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts, 1899. 173 Mass. 335, 53 N. E. 816, 73 Am. St. Rep. 298.)

Action by Annie L. Moore against the New York, New Haven & Hartford Railroad Company. There was a decision for defendant.

HOLMES, J. This is an action by a passenger to recover for damage to her luggage, suffered somewhere in the course of a passage from Charleston, Tenn., to Boston. The passage was over six connecting railroads. It does not appear where the damage was done, and the plaintiff seeks to recover upon a presumption that the accident happened upon the last road.

The so-called "presumption" was started and justified as a true presumption of fact that goods shown to have been delivered in good condition remain so until they are shown to be in bad condition, which happens only on their delivery. But it was much fortified by the argument that it was a rule of convenience, if not of necessity, like the rule requiring a party who relies upon a license to show it. 1 Greenl. Ev. § 79; Pub. St. c. 214, § 12. As we, in common with many other American courts, hold the first carrier not answerable for the whole transit, and not subject to an adverse presumption (Farmington Mercantile Co. v. Chicago, B. & Q. R. Co., 166 Mass. 154, 44 N. E. 131), it is almost necessary to call on the last carrier to explain the loss if the owner of the goods is to have any remedy at all. To do so is not unjust, since whatever means of information there may be are much more at the carrier's command than at that of a private person. These considerations have led most of the American courts that have had to deal with the question to hold that the presumption exists. Smith v. Railroad Co., 43 Barb. (N. Y.) 225, 228, 229, affirmed in 41 N. Y. 620; Laughlin v. Railway Co., 28 Wis. 204, 9 Am. Rep. 493; Railroad Co. v. Holloway, 9 Baxt. (Tenn.) 188, 191; Dixon v. Railroad Co., 74 N. C. 538; Leo v. Railway Co., 30 Minn. 438, 15 N. W. 872; Railway Co. v. Culver, 75 Ala. 587, 593, 51 Am. Rep. 483; Beard v. Railway Co., 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; Railway Co. v. Harris, 26 Fla. 148, 7 South. 544, 23 Am. St. Rep. 551; Faison v. Railway Co., 69 Miss. 569, 13 South. 37, 30 Am. St. Rep. 577; Forrester v. Railroad Co., 92 Ga. 699, 19 N. E. 811. In the opinion of the court the weight of argument and authority is on that side. Mr. Justice LATHROP and I have not been able to free our minds from doubt, because we are not fully satisfied that the court has not committed itself to a different doctrine. Still it has not dealt with it in terms. In Darling v. Railroad Corp., 11 Allen (Mass.) 295, the only question discussed was

a question of contract. In Swetland v. Railroad Co., 102 Mass. 276, the question was as to frozen apples. It appeared that the weather had been very cold before delivery to the defendant. The presumption was not mentioned. These are the two nearest cases.

Judgment for the plaintiff.

March 7th 1924

THE RIGHTS OF THE COMMON CARRIER OF GOODS

I. Liability of Consignor and Consignee for the Carrier's Charges [1]

WOOSTER v. TARR.

(Supreme Judicial Court of Massachusetts, 1864. 8 Allen, 270, 85 Am. Dec. 707.)

Contract to recover for the carriage of mackerel from Halifax to Boston.

It was agreed in the superior court that the defendants shipped the mackerel at Halifax, upon a vessel of which the plaintiffs were part owners, said Wooster being master, under a bill of lading in the usual form, to be delivered at Boston "unto Messrs. R. A. Howes & Co., or to their assigns, he or they paying freight for said goods," etc. On the arrival of the vessel at Boston, Wooster was informed by Howes & Co. that the mackerel had been sold to "arrive," to a person to whom they requested him to deliver them. The mackerel were accordingly delivered, and payment demanded of Howes & Co., but refused. Howes & Co. were then, and still are, insolvent. The mackerel, at the time of their delivery on board the vessel, had been purchased and paid for by the defendants for and on account of Howes & Co., at whose risk they were after shipment; but this fact was unknown to the plaintiffs. The mackerel were entered at the custom house in Halifax in the name of the defendants.

Upon these facts, judgment was rendered for the plaintiffs, and the defendants appealed to this court.

BIGELOW, C. J. The question raised in this case is very fully discussed in Blanchard v. Page, 8 Gray, 281, 286, 290–295. It is there stated to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. Of the correctness of this statement there can be no doubt. The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor. The dictum of Bayley, J., in Moorsom v. Kymer, 2 M. & S. 318, subsequently repeated by Lord Tenterden in Drew v. Bird, Mood. & Malk. 156, that in the absence of an express contract by the shipper to pay freight, when the goods

[1] For discussion of principles, see Dobie, Bailm. & Carr. § 147.

are by the bill of lading to be delivered on payment of freight by the consignee, no recourse can be had for the price of the carriage to the shipper, has been distinctly repudiated, and cannot be regarded as a correct statement of the law. Sanders v. Van Zeller, 4 Q. B. 260, 284; Maclachlan on Shipping, 426.

It is contended, on the part of the defendants, that the omission of the master to collect the freight of the consignees of the cargo or their assigns, under the circumstances stated, was a breach of good faith towards the shippers, which operates as an estoppel on him and the other owners of the vessel, whose agent he was, to demand the freight money of the defendants. But there are no facts on which to found an allegation of bad faith against the master. He did no act contrary to his contract or inconsistent with his duty towards the shippers. It is true that he omitted to enforce his lien on the cargo for the freight, by delivering it without insisting on payment thereof by the consignees. This was no violation of any obligation which he had assumed towards the defendants as shippers of the cargo. A master is not bound at his peril to enforce payment of freight from the consignees. The usual clause in bills of lading that the cargo is to be delivered to the persons named or his assignees, "he or they paying freight," is only inserted as a recognition or assertion of the right of the master to retain the goods carried until his lien is satisfied by payment of the freight, but it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains. Shepard v. De Bernales, 13 East, 565; Domett v. Beckford, 5 B. & Ad. 521, 525; Christy v. Row, 1 Taunt. 300. Although the receipt of the cargo under a bill of lading in the usual form is evidence from which a contract to pay the freight money to the master or owner may be inferred, this is only a cumulative or additional remedy, which does not take away or impair the right to resort to the shipper on the original contract of bailment for the compensation due for the carriage of the goods.

Judgment for the plaintiffs.

II. Demurrage Charges by Railroads [2]

KENTUCKY WAGON MFG. CO. v. OHIO & M. RY. CO.

(Court of Appeals of Kentucky, 1895. 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. Rep. 326.)

Suit in equity by the Kentucky Wagon Manufacturing Company against the Ohio & Mississippi Railway Company and others to enjoin defendants from refusing to deliver to complainant certain freight. The petition was dismissed, and complainant appeals.

HAZELRIGG, J.[3] The Kentucky Wagon Company is a corporation extensively engaged at South Louisville in the business of manufacturing and selling wagons. Its works are located near the junction of the tracks of the Louisville & Nashville and the Louisville Southern Railroad Companies, and upon its yards it has its own switches and side tracks, connecting with each of these roads, and with these roads alone. It receives its materials in car-load lots, and sends out much of the finished product in the same way. These railroad companies, the one or the other, have physical connection with every other railroad entering the city of Louisville, and are under contract with the wagon company, for a stipulated consideration, to deliver upon the side tracks of the latter all loaded cars consigned to that company over their own lines, or over their connecting lines, which cars, when unloaded by the wagon company, the carriers are to remove free of charge. In February, 1890, the two roads named, together with the other railways entering the city of Louisville, conceiving that their patrons who handled these shipments in carload lots were unreasonably detaining the cars of the carriers, using them for storage purposes, and otherwise materially impeding the service, formed what is known in the record as the "Louisville Car-Service Association," and through it at once promulgated certain rules and regulations calculated to remedy the evil, and insure the prompt unloading of the consignments and consequent prompt return of the cars. On the other hand, the shippers, conceding that the abuse complained of had in fact grown up, though not through their fault, and contending that the association of the carriers was illegal and wrongful, and the rules they were attempting to enforce unreasonable and exorbitant, formed a counter association to resist their enforcement. The wagon company was a member of this organization, and refusing to conform to the rules of the car-service association, or pay the charges accumulating against it, by reason of its detention of cars for more than 48 hours after delivery, the carriers refused to deliver

[2] For discussion of principles, see Doble, Bailm. & Carr. § 147.

[3] Parts of the opinion have been omitted.

freight consigned to it over their respective lines. Whereupon, in November, 1890, the wagon company brought this action in equity against some 11 of the railroad companies, to restrain them from refusing to deliver to it on its side tracks, because of its noncompliance with the car-service rules, certain designated car loads of freight ready for delivery, and from so refusing in the future. * * *

That there may be a reasonable charge for the detention of the carrier's cars by the consignee or consignor beyond a reasonable time within which to load and unload them cannot now be doubted, and that such charges may be imposed and enforced through what are known over the country as "Car-Service Associations," is equally well settled. A few cases, only, had arisen in the courts prior to the institution of this action, but several have since been considered, and we know of no exception to the general doctrine that reasonable rules, involving charges for such detention, may be promulgated by such associations, and that such organizations have universally been held to effect beneficial results in car service, alike to the shipper and to the carrier. Whether a charge of one dollar per day or fraction thereof, made for detention of cars and use of track on cars not unloaded within 48 hours after arrival, not including Sundays and legal holidays, and on empty cars not loaded within 48 hours after being placed, is a reasonable charge, and the time fixed for the loading and unloading, as required in the rule, is a reasonable time, are questions of fact, and on these issues the preponderance of the proof is clearly with the carriers. Such was the finding of the chancellor, at the hearing of the motion for a modification of the injunction, and his conclusion at the final hearing; and such was the opinion of the judge of this court as to the reasonableness of the time for redelivery when the case was heard on a motion to reinstate the injunction after its modification. Such, indeed, has been the determination of every tribunal where a similar provision has been adopted by the various car-service associations of the country, nor has it been found objectionable to the courts because no exception is made in behalf of the shippers by reason of an unfavorable condition of the weather. The rule, to be beneficial to all alike, must be of universal application, and a rare or exceptional circumstance, incident to a particular shipper at some particular time, cannot be allowed to annul the rule. The rule must allow time enough to meet all cases likely to arise, and that such is the case here is abundantly shown by the testimony. That the rate of one dollar per day is also reasonable, is conclusively shown. It may be somewhat more than the usual per cent. on the first cost of a car, but this is not the proper criterion.

A railroad company does not construct cars for the purpose of storing property in them, and their use for transportation involves the use of costly railway tracks, and other expenditures. It may be true, as contended, that the shipper was not consulted in framing these rules. We think, however, if the rules are reasonable this fact does not

vitiate them. No complaint is made that there was an attempt to enforce them before ample notice had been given of their adoption. So, too, if the rules are reasonable, the fact there is no reciprocity of indemnity or counter penalties provided, cannot avail the appellant. If there is any principal of law well understood by shippers, it is that, for any dereliction of duty, the common carrier may be held accountable. Nor do we think that the roads surrendered their corporate autonomy and functions by relegating the control and management of their affairs to the control of the association. If the rules may be enforced by the respective carriers in their separate capacities, they may be enforced by them jointly. In the executive committee of this voluntary association, each road has its representative, and the rules adopted by the association are accepted by the carriers, and become their own rules. What the carriers may each do for themselves, they do by a common agent. This practice is common when union depots are under the control of a common agent of all the roads using the depot. It is true that the rule involves the agreement of the roads to make their charges uniform, and this is supposed by counsel to be in violation of the law preventing agreements among rival carriers not to compete with each other. We do not regard the principle contended for as applicable to this case. Manifestly the object of the rule fixing a uniform charge for the detention of cars, is not for the purpose of raising revenue at all. That feature is insignificant, the purpose being to facilitate transportation; and the less revenue there is derived from the enforcement of the charge, the greater the carriers are benefited and their facilities increased for serving the public. The agreement in this case to fix a uniform rate is an advantage, and not an injury, to the appellant and its associates. * * *

III. Discrimination in the Carrier's Charges [4]

JOHN HAYS & CO. v. PENNSYLVANIA CO.

(Circuit Court of United States, N. D. Ohio, 1882. 12 Fed. 309.)

BAXTER, Circuit Judge.[5] * * * The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad offi-

[4] For discussion of principles, see Doble, Bailm. & Carr. § 148.

[5] Parts of the opinion are omitted.

cials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same.

It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results *might* follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages, which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guarantied to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress. * * *

MESSENGER v. PENNSYLVANIA R. CO.

(Supreme Court of Judicature of New Jersey, 1873. 36 N. J. Law, 407, 13 Am. Rep. 457.)

In case. On demurrer to declaration.

The declaration sets out, (first and second counts,) that the plaintiffs, were large shippers of live hogs from Chicago and Pittsburg to Jersey City, and that the defendants, in the city of New York, on the 1st of December, 1870, agreed with the plaintiffs, that if they would ship by them, they would, on and after January 1st, 1871, transport their hogs from Chicago and from Pittsburg, to Jersey City, at the regular rates, allowing them a drawback of twenty cents per hundred pounds upon all hogs shipped from Chicago, and ten cents per hundred upon those shipped from Pittsburg; and further, should the defendants, after January 1st, 1871, transport the same description of freight for others, between the same points, except seven parties named, at less than their regular rates, or should allow such others a drawback, then they should allow the plaintiffs such further drawback as would bring their freights twenty cents per hundred and ten cents per hundred lower than the lowest. * * *

BEASLEY, C. J.[6] * * * There can be no doubt that an agreement of this kind is calculated to give an important advantage to one dealer over other dealers, and it is equally clear, that if the power to make the present engagement exists, many branches of business are at the mercy of these companies. A merchant who can transport his wares to market at a less cost than his rivals, will soon acquire, by underselling them, a practical monopoly of the business; and it is obvious, that this result can often be brought about if the rule is, as the plaintiffs contend that it is, that these bargains giving preferences can be made. A railroad is not, in general, subject to much competition in the business between its termini; the difficulty in getting a charter and the immense expense in building and equipping a road, leaves it, in the main, without a rival in the field of its operation; and the consequence is, the trader who can transmit his merchandise over it on terms more favorable than others can obtain, is in a fair way of ruling the market. The tendency of such compacts is adverse to the public welfare, which is materially dependent on commercial competition, and the absence of monopolies. Consequently, the inquiry is of moment, whether such compacts may be made. I have examined the cases, and none that I have seen, is, in all respects, in point, so that the problem is to be solved by a recurrence to the general principles of the law. * * *

Recognizing this as the settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions. Such partiality is legitimate in private business, but how

[6] Parts of the statement of facts and of the opinion are omitted.

can it square with the obligations of a public employment? A person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefit of all, and, therefore, to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. If he exacts different rates for the carriage of goods of the same kind, between the same points, he violates, as plainly, though it may be not in the same degree, the principle of public policy, which, in his own dispute, converts his business into a public employment. The law that forbids him to make any discrimination in favor of the goods of A. over the goods of B., when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services. The rule that the carrier shall receive all the goods tendered, loses half its value, as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of others. Nor would this defect in the law, if it existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services, he disturbs that equality of rights among his employers which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge, for precisely the same offices, to another, I think it should be held that the higher charge is not reasonable; a presumption which would cut up by the roots the present agreement, as, by the operation of this rule, it would be a promise founded on the supposition that some other person is to be charged more than the law warrants. * * *

IV. The Carrier's Lien[7]

BOGGS v. MARTIN.

(Court of Appeals of Kentucky, 1852. 52 Ky. [13 B. Mon.] 239.)

SIMPSON, J.[8] * * * Where there is no special contract to the contrary, the carrier has a lien upon the goods and a right of detention until the freight is paid, and he may detain any part of the mechandise contained in the same bill of lading, and consigned to the same person, until the freight upon the whole of it

[7] For discussion of principles, see Dobie, Bailm. & Carr. § 149.

[8] Part of the opinion is omitted.

be paid. Abb. on Shipp. 247. But if he once parts with the possession out of the hands of himself and his agents, he loses his lien or hold upon the goods, and cannot afterward reclaim them. Id. 248.

The question in this case upon the evidence was, had the goods passed out of the hands of the agents of the boat, and the lien upon them for the payment of the freight been thereby lost?

Upon this point the court below instructed the jury: "If they believed from the evidence that the rosin and pitch were put out of the steamboat on the wharf in Louisville, and the bill of lading was sent to the plaintiff, and he took possession of and hauled away one load or any part of the rosin and pitch with the consent of the defendants, these facts themselves constituted, in law, a delivery of possession, and the lien for the freight was thereby lost."

This exposition of the law we deem erroneous, for the following reasons:

The goods, although put out of the steamboat on the wharf, were still in the possession of the agents of the boat, as it clearly appeared from the testimony; and the act of unloading a boat and placing the merchandise on the wharf does not indicate any intention to part with the possession of it until the freight is paid. Indeed, the law is, that the officers cannot detain the goods on board the boat until the freight is paid, as the merchant or consignee would then have no opportunity of examining their condition. Abbott, 248.

It was the duty of the carriers to send the bill of lading to the consignee, to apprise him that the goods had arrived and were ready to be delivered, so that he could attend and examine their condition, pay the freight due, and take them into his possession. Sending the bill of lading to him, therefore, amounted to nothing more than a communication of the fact that the goods had arrived and an offer to deliver them upon the payment of the freight. No other inference arises from the act, nor could it justly create an implication that the delivery of the bill of lading was intended to operate as a waiver of the lien for the freight, and a delivery of the possession of the goods to the consignee.

As the master may detain any part of the merchandise for the freight of all that is consigned to the same person, and as, if he make a delivery of part to the consignee, he may retain the residue even against a purchaser until payment of the freight of the whole (Sodergreen v. Flight, 6 East, 622), the delivery in the present case of the seven barrels of pitch and rosin did not necessarily constitute a delivery of the whole to the consignee. A delivery of part will, in some cases, amount to the delivery of the whole, but whether it is in a particular case to have that effect

or not will depend upon the intention with which the act was done. The seven barrels were no doubt allowed to be taken, under the belief that the freight would be paid without objection, but the permission to take the possession of part did not amount to a waiver of the lien upon the residue by legal implication nor to a constructive delivery of that residue to the consignee, unless it was given with that intention, which was a matter of fact for the jury to determine.

These acts, therefore, neither separately nor in conjunction constituted by legal deduction a delivery of the possession of the whole of the goods to the plaintiff.

Wherefore, for the error of the court in its instruction to the jury, the judgment is reversed, and cause remanded for a new trial, and further proceedings consistent with this opinion.

THE VIRGINIA v. KRAFT.

(Supreme Court of Missouri, 1857. 25 Mo. 76.)

One Whiting, acting as a forwarding merchant in New Orleans, shipped for St. Louis, per the steamboat "Virginia," five cases of scythes. When said goods were received on board of said steamboat, the said Whiting demanded, and the clerk of said steamboat paid to said Whiting the sum of $153.42. Said sum was entered as "charges" in the bill of lading. Of said sum of $153.42, a portion—$147.92—formed no part of the charges paid by or due Whiting on account of the said merchandise shipped on the "Virginia;" it was a charge made by Whiting on account of the former advances, travelling expenses, lawyer's charges for collecting, etc. The merchandise shipped by said Whiting as forwarding agent was delivered to E. F. Kraft & Co., the owners thereof, at St. Louis, who refused to pay to said steamboat the said item of $147.92, alleging that they were not liable therefor, but admitting their liability to the extent of the remaining advances. This suit was brought in behalf of said steamboat to recover said sum of $153.42. * * *

The jury returned a verdict for the plaintiff for the whole amount sued for.

SCOTT, J.[9] In the case of White v. Vann, 6 Humph. (Tenn.) 73, 44 Am. Dec. 294, the court said that it was "proved by several enlightened merchants and well-informed owners of steamboats, that it is the long and well-established custom and usage of trade, not only in the Tennessee River, but throughout the United States, for freighters of goods to advance to the forwarding agents

[9] Part of the statement of facts is omitted.

the existing charges upon them, which the consignees and owners are liable to refund; that this usage is indispensable to the successful prosecution of commercial operations, and of great and mutual advantage to all parties." We have copied the above extract as showing the usage, because upon examination we have not been enabled to find much, if anything, in relation to it. The advantages resulting from this usage are so obvious that it must commend itself to every one; and we should regret to see it a stranger to our courts. But advantageous as this usage is shown to be, we do not know, nor can we conceive anything that would more effectually render it odious than such an extension of it as would make it cover advances for claims or demands on the owner or consignees wholly foreign to and disconnected with any cost or charge for transportation. If this were tolerated, not only the forwarding agent, but every one who would collude with him, might obtain payment of demands, whose justice the owners or consignees refused to recognize. It would be the introduction of a novel mode for the collection of debts where payment had been denied on the ground of their invalidity, and a means of compelling the owner to submit to unjust exactions or to refuse him his goods.

As the debt paid by the plaintiff through her agent was in nowise incurred by, or in any way connected with, the transportation of the merchandise, she could not by such voluntary payment, unsupported by any usage, make herself a creditor of the defendant. Nor can the officers of the plaintiff, by any custom or usage, protect her from the consequences of their neglect in not ascertaining whether their advances were the costs of transportation. Would they advance any amount, however enormous, and expect to save her from loss by a usage which did not require them to ascertain the validity of the charges? A custom to encourage negligence at the expense of others would scarcely be tolerated by the law. Being familiar in the business of transporting merchandise, if the items of the charges were produced and examined, the agent could see at once whether they were usual and proper.

The principle that, where one of two innocent persons must suffer by the act of a third, he should bear the loss who has placed it in the power of the third person to do the injury, has no application here. The plaintiff is not an innocent party. Her agents were guilty of gross negligence in not informing themselves of the nature of the charges for which they made an advance. There is no pretence in the circumstances of the case to warrant the instruction to the effect that the defendants, by receiving the goods, acknowledged the justice of the charges, and were liable to pay them, unless the plaintiff, when she advanced them through her

agent, knew that they were not the ordinary and usual charges incurred in the transportation and shipment of goods.

As the charge was illegal and unjust; as there was no evidence that the defendants were aware of its nature when they received the goods; as they objected to it so soon as it was known; and as they could not contemplate that an improper charge would be made against them,—there is no foundation for the presumption that they acquiesced in or acknowledged the justice of the plaintiff's demand. The defendants, upon tendering the legal advances, would have been entitled to the possession of their goods, and might by an action have compelled their delivery. As they have them lawfully without suit, there is no reason why they should be placed in a worse situation than if they had obtained them by suit. The other judges concurring, the judgment will be reversed, and the cause remanded.

THE POST-OFFICE DEPARTMENT

I. The Liability of Postmasters [1]

RAISLER, Postmaster, v. OLIVER et al.

(Supreme Court of Alabama, 1893. 97 Ala. 710, 12 South. 238, 38 Am. St. Rep. 213.)

COLEMAN, J.[2] The plaintiffs, Oliver & Co., sued Raisler to recover damages sustained in consequence of the loss of two registered letters delivered at the post office to defendant, who was postmaster at Athens, Ala., to be forwarded by mail to certain parties at Nashville, Tenn. It is averred that the loss was the result of the culpable negligence of the defendant. The law is well established that the postmaster general is not responsible for the negligence of postmasters or their deputies, or such assistants. Public policy requires the recognition and application of this rule. We think, upon sound principles of law, and supported by many authorities, that deputy postmasters are held liable for losses and injuries caused by their own defaults and negligence. Story, Bailm. § 463; Lane v. Cotton, 1 Ld. Raym. 646; Story, Ag. § 319b; 2 Wait, Act. & Def. 15; 2 Kent, Comm. § 610; Railroad & Banking Co. v. Lampley, 76 Ala. 364, 52 Am. Rep. 334; Whitfield v. Le Despencer, 2 Cowp. 754; Teal v. Felton, 12 How. 285, 13 L. Ed. 990; Schroyer v. Lynch, 8 Watts (Pa.) 454; Claflin v. Houseman, 93 U. S. 130, 23 L. Ed. 833. It would seem, from these authorities, and others which might be cited, that a postmaster is not responsible for the defaults or misfeasance of his clerks or assistants, although appointed by him and under his control, unless it be shown that the postmaster was negligent in not exercising proper care and prudence in the selection of suitable and competent persons to perform the duties of clerks or deputy assistants, or unless it be shown that the postmaster himself was negligent in the duty resting upon him, to properly superintend such clerks or assistants in the performance of the particular acts or duty, the doing of which, or the omission to do which, caused the loss and injury. 2 Kent, Comm. § 611; Story, Bailm. § 463; Keenan v. Southworth, 110 Mass. 474, 14 Am. Rep. 613; Story, Ag. § 319a; Dunlop v. Munroe, 7 Cranch, 242, 3 L. Ed. 329.

The exemption from liability of the postmaster for the defaults and misfeasance of his clerks and subassistants is available to the

[1] For discussion of principles, see Doble, Bailm. & Carr. § 151.

[2] The statement of facts is omitted.

postmaster only in cases where such clerks or subassistants are appointed in pursuance of some law expressly authorizing it, so that, by virtue of the law and the appointment, the appointees become in some sort public officers themselves. The rules and regulations of the post-office department provide for employment of clerks and assistants, when necessary for a proper and speedy discharge of the business of the office; and, when made in pursuance of such rules and regulations, it may be the postmaster himself is not responsible for the defaults of his clerks and assistants, unless, under proper averments, it be shown there was negligence in their selection or superintendence, as we have stated above. Under the view we take of the evidence, these principles do not necessarily control the present case. A postmaster who employs a clerk or assistant, independent of express authority, and who is paid by him out of his own salary or means, is liable for the default or misfeasance of his clerk or assistant, as any private person would be for the acts of his agent or employé. The doctrine of respondeat superior applies in such cases. There is nothing in the record to show that the employment of Cain was not of this latter character; and if we deemed it necessary, in order to sustain the rulings of the trial court, we would presume that his employment by Raisler, the postmaster, was merely to assist him, as an individual, in the discharge of his official duties. Railroad & Banking Co. v. Lampley, 76 Ala., supra, 365, 366, 52 Am. Rep. 334.

It may be stated, as a general rule, that whenever a legal right arises, and the state court is competent to administer justice, the right may be asserted in the state court, although the federal court may have jurisdiction of the same question, subject, however, to the proviso that there is no law limiting jurisdiction to the federal courts. Claflin v. Houseman, 93 U. S. 130, 136, 23 L. Ed. 833; Teal v. Felton, 12 How. 284, 13 L. Ed. 990.

The action of the trial court in overruling the demurrer to the first count of the complaint, and its several rulings upon questions of evidence, to which objections were reserved, are in accord with these principles, and are free from error.

The responsibility of a postmaster for money or letters received by him in his official character is not that of a common carrier. Proof that the letters containing money were delivered to the defendant for registration, or to Cain, in his presence and by his direction, and of the loss of the letters and money, without more, was not sufficient to authorize a recovery. The burden was on the plaintiff to affirmatively show culpable negligence, and such a state of facts as to authorize the jury to attribute the loss to such negligence. If there was evidence tending to show that the defendant was thus negligent in more ways than one, it was not incumbent upon the plaintiff to satisfy the jury of the one particular act of negligence which led to the loss, or to show who got the money. It was sufficient that

the jury was reasonably satisfied that the defendant did not exercise that care and prudence in the discharge of his duties in regard to the letters as a reasonable and prudent man would in regard to his own business, and that such neglect was the cause of the loss or injury. As there were no exceptions taken to any of the instructions given by the court to the jury, we presume the court properly instructed the jury as to the burden of proof, and as to what was necessary to constitute culpable negligence on the part of the defendant.

Under the foregoing rule, charge No. 1, requested by defendant, was properly refused. Charge No. 2 invaded the province of the jury, and was properly refused. It was also objectionable as being argumentative. We find no error in the record. Affirmed.

II. The Liability of Contractors for Carrying the Mail[3]

BANKERS' MUT. CASUALTY CO. v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Circuit Court of Appeals of United States, Eighth Circuit, 1902. 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397. Petition for Writ of Certiorari Denied 187 U. S. 648, 23 Sup. Ct. 847, 47 L. Ed. 348.)

CARLAND, District Judge,[4] delivered the opinion of the court.

This case presents but one question for our consideration, and that is whether or not the defendant in error is liable to the plaintiff in error upon the facts stated.

No federal decision is called to our attention, and we are unable to find any, parallel to the case at bar. There are, however, well-settled principles of law which we believe must determine the case. It is claimed by plaintiff in error that it is alleged in the complaint, and admitted by the demurrer, that defendant in error had no contract relation with the United States in pursuance of which it carried the mail between Minneapolis, Minn., and Harvey, N. D.; that the duty to carry the mail safely was imposed upon defendant in error by the constitution and laws of the United States; and that, this duty being imposed by law, any person injured by a violation thereof would have his remedy. If we correctly understand counsel, it is argued that there was no contract relation between the defendant in error and the United States, in order to avoid the objection that plaintiff in error stands in no such relation to that con-

[3] For discussion of principles, see Doble, Bailm. & Carr. § 152.

[4] The statement of facts is omitted.

tract as would enable it to maintain an action for a breach thereof. In the view we take of the case, however, we do not see how it makes any difference whether defendant in error was carrying the mail under and by virtue of a contract with the United States, or whether that duty was imposed by the constitution and laws thereof; in either event it was a public agent of the United States, and its liability must be determined accordingly.

The defendant in error, in regard to its liability for the loss of the money, was in no sense a common carrier. As was said in the case of Banking Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334: "Between a contractor for carrying the public mails and the sender of letters, there is no privity of contract, and the contractor has no right to and receives no remuneration from the sender. The government undertakes the transmission of the mails, and receives pay therefor by the postage charged. The contractor's contract is with the government, and by it his compensation is paid. He owes a duty, not to the sender of the letters as an individual, but to the integral public, springing from his agreement to carry the mails. The public mail is not the proper subject of a common carrier's charge, and the extraordinary responsibility attached by law to such employment does not attach to a mail contractor. He does not become an insurer of the safe transportation of mail matter; the extent of his liability is the same as that of a bailee for hire. The railroad company was not transformed into a common carrier as to the mails because, being engaged in the regular business of transporting goods for the public, it was, at the same time, carrying the mails by direction and employment of the proper department of the government. The occupation of the company was of a dual character. It was acting in two capacities, created and regulated by separate and distinct contracts and employments. The liability of the defendant cannot, therefore, be determined by the rules governing the responsibility of a common carrier."

It seems clear to us that defendant in error was a public agent of the United States in relation to carrying the mail, for the reason that the constitution of the United States conferred upon it the power to establish post offices and post roads, and this power was granted by the people as one of the sovereign powers, to be exercised by the general government exclusively. By virtue of this grant of power, the United States has always, through its post-office department, assumed the exclusive charge of the carriage and delivery of the mail for the benefit of all the people. In doing so, the United States is beyond question engaged in the discharge of a governmental function. All persons or corporations who are engaged in the carriage or delivery of the mail by the authority of the United States, conferred by contract or general laws, are but the instruments used by it to discharge this function. As a practical illustration as to whether the defendant in error was engaged in the

discharge of a governmental function, let us suppose that some person had attempted to obstruct the carriage and delivery of this mail sack, which contained the money in controversy, at the post office at Harvey, N. D., while it was in possession of defendant in error. Would not the person be liable to punishment under the penal laws of the United States? Beyond question he would. From whence springs the power of the United States to punish such an act? It springs from the authority that all governments possess of punishing the person who obstructs that government in the lawful discharge of its duty. It now becomes necessary to ascertain what the liabilities of public agents are, and upon this question there seems to be little, if any, conflict of authority. A public officer or agent, provided he has exercised ordinary care to select competent subordinates, is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences or omissions of duty, of the subagents or servants, or other persons properly employed by or under him in the discharge of his official duties. Robertson v. Sichel, 127 U. S. 507, 8 Sup. Ct. 1286, 32 L. Ed. 203; Story, Ag. § 319. In reference to the post-office department, it has been uniformly held that the postmaster general, the deputy postmasters, and their assistants and clerks appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him and subject to his orders. Lane v. Cotton, 1 Ld. Raym. 646; Whitfield v. Le Despencer, 2 Cowp. 754; Dunlop v. Munroe, 7 Cranch, 242, 3 L. Ed. 329; Schroyer v. Lynch, 8 Watts (Pa.) 453; Bishop v. Williamson, 11 Me. 495; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 248; Conwell v. Voorhees, 13 Ohio, 523, 42 Am. Dec. 206; Story, Bailm. §§ 462, 463; Robertson v. Sichel, 127 U. S. 507, 8 Sup. Ct. 1286, 32 L. Ed. 203. The same doctrine has been extended or applied to mail contractors by the cases of Conwell v. Voorhees, 13 Ohio, 523, 42 Am. Dec. 206; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 248; Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504. The court, however, refused to extend the rule to mail contractors in the cases of Banking Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334; Sawyer v. Corse, 17 Grat. (Va.) 230, 99 Am. Dec. 445. The Alabama court adopted and followed the reasoning of the Virginia court.

The reasoning of the cases cited is illustrated by the following language taken from the opinion in Banking Co. v. Lampley: "The contractor, being the person who contracts with and is paid by the government, and who gives a guaranty for the faithful discharge of the service, is the public agent if such contract constitutes an agency. He is the one directly responsible to, and with whom, the government deals. He employs his own carriers, who are paid by him, and who are not known to the government other than as his employés. As to civil responsibility, the contractor stands be-

tween the carrier and the government, although, for the purpose of public security, an oath may be required of the carrier, and penalties imposed for violations of the laws of the postal service. In a sense the carrier may be said to do work for the government, not as an agent, but as one employed by the contractor, in his own name, for his individual benefit, and on his personal responsibility, as necessary help to do the service which he has contracted to do. Laborers employed by a contractor for the construction of naval vessels, or for the erection of public buildings, may in the same sense be said to do work for the government, but they are not public laborers. We approve and adopt the legal propositions as to the liability of a contractor, maintained and asserted in Sawyer v. Corse, 17 Grat. [Va.] 230, 99 Am. Dec. 445."

This reasoning would make the defendant in error a public agent, but would deny that position to the agent at Harvey; the subordinate agent of the defendant in error being what is called a carrier in the opinion under consideration. We do not think that the comparison between a laborer employed by a contractor for the construction of naval vessels or for the erection of public buildings an apt one. The United States in building a public building, or in constructing a naval vessel through a contractor, is not exercising sovereign power or engaged in a purely governmental function. It is acting in its purely private or business capacity. Any one possessed of sufficient means may construct a vessel or build a building. The United States only can carry the mail. Hence we believe that the character of the service in which the agent is engaged must determine in the case at bar as to whether the subordinate agents of the defendant in error, in so far as they were engaged in carrying the mail, were or were not public agents. Let us now apply the principles of law which, in our opinion are controlling, to the facts in this case. There is nothing alleged in the complaint that would connect the defendant in error personally with the wrong complained of; that is, there is no allegation that any officer of the defendant in error whose act or omission the court would be bound to hold was the act or omission of defendant in error did any act, or omitted to do any act, which caused the loss of the mail. There is no allegation that the defendant in error did not exercise ordinary care in the selection of competent persons to handle the mail after it reached Harvey.

The allegation of the complaint in regard to the agent at Harvey is as follows: "That upon the arrival of defendant's said train and postal car at said town of Harvey, North Dakota, said railway mail clerk or other postal official, between eleven and twelve o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained, to one James Magson, the night station agent or night operator of defendant at said town of Harvey; that said night station agent or night op-

erator was not sworn as an official or employé of the post-office department of the United States government as required by law, but was then and there employed and duly authorized by the defendant to receive and take charge of all mail matter received over defendant's said line of railway at said town of Harvey, including the mail sack or mail pouch containing said package of currency, and to deposit same in defendant's depot at Harvey, North Dakota, and did so receive, take charge of, and deposit said mail sack or mail pouch."

The fact that Magson was not sworn is not controlling, for if the defendant in error, in its business in carrying the mail, was a public agent, then it was responsible for its own negligence only, and not for the negligence of its servants engaged in the same business. If the defendant in error was a person, this case would be plain. The apparent difficulty arises from separating the negligence of defendant in error from the negligence of its subordinate agent arising from the fact that a corporation must perform all its acts through agents. We think, however, that there is a well-defined distinction with reference to its duties as a carrier of the mail. To illustrate: Supposing the agent Magson had left the mail sack on the depot platform, and by reason thereof the same had been stolen. This, in the absence of any showing that defendant in error had not used proper care in the selection of Magson as its agent, would have been the negligence of Magson, for which he would have been liable, but it would not have been the negligence of defendant in error. If, however, some officer of defendant in error who stood in such a relation to the company that his negligence would be its negligence should negligently do some act whereby a loss occurred from the mail, then defendant in error would be liable. Let us now examine the acts of negligence alleged.

Section 713 of the postal regulations of 1893, set out in the complaint, determined the duty of defendant in error in relation to the mail sack after its receipt by Magson. The regulation is as follows: "The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed."

Whatever duty this regulation imposed upon defendant in error must be determined from the regulation itself. The demurrer admits the existence of the regulation, not the pleader's opinion or legal conclusion of its effect. It simply made it the duty of defendant in error to deliver the mail sack at the post office. There is no allegation that the mail sack was not delivered at the post office, but that, after it was delivered to Magson, some person unknown to the pleader opened the mail sack, and abstracted the package of money in controversy. We know nothing about the facts connected with the loss of the money except what is alleged in the com-

plaint, and in the discussion of the case we of course disclaim any intention of reflecting on the character of any one. The allegations of the complaint are entirely consistent with the theory that Magson stole the money. If so, in the absence of any allegation of negligence of defendant in error in employing him, there is no evidence of negligence that would charge the defendant in error, as all the precautions that it is alleged would have prevented the theft would not have prevailed against Magson, for by the act of the postal clerk and defendant in error the custody of the mail sack was delivered to him. Mere proof that the package of money was stolen, no matter by whom, creates no liability against defendant in error, unless its own negligence was the direct cause of the larceny, as contradistinguished from the negligence of its agent at Harvey. We are not informed by the record as to what was done with the mail sack after Magson deposited the same in defendant in error's depot, or what became of it afterwards. We are satisfied, however, that, if the negligence of any one directly contributed to the larceny, it was the negligence of Magson, for whose negligence in the matter of carrying the mail the defendant in error is not liable.

The judgment below must be affirmed, and it is so ordered.

ACTIONS AGAINST CARRIERS OF GOODS

I. Parties to the Action [1]

CARTER v. SOUTHERN RY. CO.

(Supreme Court of Georgia, 1900. 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354.)

Action by W. R. Carter against the Southern Railway Company. Judgment for defendant, and plaintiff brings error.

COBB, J.[2] Carter sued the railroad company for damages resulting from the breach of a contract of shipment which the defendant had entered into with the plaintiff. On the trial the plaintiff introduced in evidence a receipt signed by an agent of the defendant, of which the following is a copy: "Received from W. R. Carter the following articles in apparent good order, contents and value unknown, as per coupon attached, to be transported to W. R. Carter, McRae, Ga.,"—setting forth the articles shipped. The plaintiff testified that the distance from the point from which the goods were shipped to their destination was 30 miles; that they should have been delivered in 24 hours, which was a reasonable time; that the goods were new, and in good condition, when delivered to the defendant; that they were not delivered by it at the point to which they were shipped until 25 days had elapsed from the time they were delivered to the defendant; and that, when delivered, some of the goods were in such a damaged condition that they were rendered worthless, and all of them were more or less damaged. Just before leaving the witness stand, the plaintiff stated: "The goods belonged to my wife, Mary Carter. She owned them, and I had the goods in my charge as her agent." There being no further evidence for the plaintiff, the court, upon motion of defendant's counsel, granted a nonsuit on the ground that the goods alleged to have been damaged did not belong to the plaintiff, but to his wife. To this judgment the plaintiff excepted. The question, therefore, presented for decision is whether or not the plaintiff could maintain the action in his own name.

It is an elementary principle that the action on a contract must be brought in the name of the party in whom the legal interest is vested, and that the legal interest in a contract is in the person to whom the promise is made, and from whom the consideration

[1] For discussion of principles, see Dobie, Bailm. & Carr. § 154.

[2] Part of the opinion is omitted.

passes. 15 Enc. Pl. & Prac. 499, 500; Civ. Code, § 4939. In the present case the plaintiff, although in reality he occupied the relation of agent of his wife to take charge of the goods shipped, was named both as the consignor and consignee in the contract of shipment, with no reference whatever therein to the fact of his agency. Under such circumstances the action could be maintained in his own name. Generally, it is true, an agent has no right of action upon a contract made by him in behalf of his principal, but he has a right of action in his own name "where the contract is made with the agent in his individual name, though his agency be known." Civ. Code, § 3037 (3). Certainly, the action could be maintained where the fact of agency and the name of the principal are both concealed by the agent. In such a case the agent is, in contemplation of law, the real contracting party, to whom the promise of the other party was made, and who is entitled to enforce it. Mechem, Ag. § 755; Story, Ag. (9th Ed.) § 393. But the plaintiff was the consignor of the goods shipped. The contract was made with him, and he is primarily liable for the transportation charges. The carrier dealt with him as the owner of the goods, and could not, in an action by the plaintiff to recover the goods, dispute the title, unless the title of the real owner was sought to be enforced against the carrier. Civ. Code, § 2286. In the case of Haas v. Railroad Co., 81 Ga. 792, 7 S. E. 629, suit was brought by Haas upon a contract or bill of lading made by the defendant with one Ayres. It was held that, "the bill of lading for the flour not having been indorsed to plaintiff by the party in whose favor it was issued, the former could not maintain an action against the company upon it." It appears from the record in that case that Ayres was the consignor, and Haas the consignee. The present chief justice says in the opinion: "The record does not show that this bill of lading was assigned or indorsed by Ayres to Haas. This being true, Haas, under our Code, could not bring suit on the contract made between the railroad company and Ayres."

The courts of both this country and England are now, with a few exceptions, all agreed that, where the consignor makes the contract of shipment with the carrier, he may bring an action for loss of or injury to the consignment, although he may not be the actual owner of the property. In such a case the privity of contract between the carrier and the consignor is a sufficient foundation on which to base the action. It is also well settled by the authorities that where a consignor, who is himself not the real owner, recovers damages from the carrier for a breach of the contract of carriage, the recovery inures to the benefit of the owner, and the consignor is regarded simply as the trustee of an express trust. It would seem to follow necessarily from this that a recov-

ery by the consignor for a breach of the contract would be a bar to an action by the owner in tort for the injury done him. The English courts have, so far as we are aware, uniformly adhered to the rule that an action for a breach of a contract of carriage made with the consignor may be maintained by him. In Davis v. James, 5 Burrows, 2680, a decision rendered in 1770, it was held that "action lies against carrier in name of consignor, who agreed with him and was to pay him." The question was squarely made in that case, and the court reached the conclusion above indicated. Lord Mansfield said, in the opinion which he rendered in that case: "This is an action upon the agreement between the plaintiffs and the carrier. The plaintiffs were to pay him. Therefore the action is properly brought by the persons who agreed with him and were to pay him." This decision, as above stated, was uniformly adhered to by the English courts, and, there being in this state no statute law to conflict with the rule therein announced, it became, by force of our adopting statute, the law of this state.

In Moore v. Wilson, 1 Term R. 659, the doctrine announced in the case just referred to was reaffirmed, and the court held further that it was immaterial whether the hire was to be paid by the consignor or the consignee, as the former was, in law, liable to the carrier for the hire. In Joseph v. Knox, 3 Camp. 320, it was held that an action by the consignor would lie. The opinion was rendered by Lord Ellenborough, who said: "I am of opinion that this action well lies. There is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid by the plaintiffs in London. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the nondelivery of the goods. After such a bill of lading has been signed by his agent, he cannot say to the shipper they have no interest in the goods, and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner." In Dunlop v. Lambert, 6 Clark & F. *600, the house of lords held: "Though, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the action against the carrier, yet, if the consignor make a special contract with the carrier, such contract supersedes the necessity of showing the ownership in the goods, and the consignor may maintain the action, though the goods may be the property of the consignee." The "special contract" referred to in the above quotation was simply a bill of lading declaring that the goods were

to be delivered to Matthew Robson, "freight for the said goods being paid by William Dunlop & Co.," the plaintiffs.

The case of Dawes v. Peck, 8 Term R. 330, is sometimes cited as authority for a contrary rule. That case is thus commented upon and distinguished by Judge Turley in the case of Carter v. Graves, 9 Yerg. (Tenn.) 446, 450: In that case "an action on the case was brought by a consignor against a common carrier for not safely carrying, according to his undertaking, in consideration of a certain hire and reward to be therefor paid, two casks of gin from London to one Thomas Aday at Hillmorton, in Warwickshire. The court determined that, if a consignor of goods deliver them to a particular carrier by the order of a consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier, and that the action can only be maintained by the consignee. In this case there is no contract with the consignor by the carrier for the delivery of the articles; the freight is not paid by him; the property is delivered to a carrier specified by the consignee; and, more than all, the court, in the opinions delivered, refer to the cases of Davis v. James, 5 Burrows, 2680, and Moore v. Wilson, 1 Term R. 659, and recognize them as sound authority."

A leading American case is Blanchard v. Page, 8 Gray (Mass.) 281, where, after an elaborate review of the authorities, Chief Justice Shaw reached the conclusion that "the shipper named in a bill of lading may sue the carrier for an injury to the goods, although he has no property, general or special, therein." The reasoning upon which this ruling is based seems to be unanswerable, and the decision ought to be accepted as decisive of this question. It must not be lost sight of that the present action was based upon a contract. If the action had been based upon the tort of the carrier in delivering the goods in a damaged condition, then a question entirely different from that involved in the present case would be raised. In such a case it would seem that the right of action is to recover for the injury to the interest or right in the property, and the shipper, if not the owner, could not bring such an action.

The distinction between such a case and one like the present was pointed out in Finn v. Railroad Co., 112 Mass. 524, 17 Am. Rep. 128, where it was ruled, in effect, that, in order to authorize an action by the consignor who is not the owner of the goods, there need be no express contract between him and the carrier, but that the action may be maintained upon the contract implied by the delivery and receipt of the goods for carriage, if no action ex delicto has been begun by the consignee; and that the consignor will hold the sum recovered in trust for the consignee. In Carter v. Graves, 9 Yerg. (Tenn.) 446, it was held: "A consignor cannot maintain an action on the case for the loss or injury of the

property consigned without showing that he has a general or special right thereto, but he may in all cases maintain an action of assumpsit upon a contract to deliver the property safely, he having made the same, and paid or become bound for, the consideration." In Hooper v. Railway Co., 27 Wis. 81, 91, 9 Am. Rep. 439, it was said: "The shipper is a party in interest to the contract, and it does not lie with the carrier who made the contract with him to say, upon a breach of it, that he is not entitled to recover the damages, unless it be shown that the consignee objects; for, without that, it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal."

Another well-considered case, in which an elaborate review of the authorities is made, is Express Co. v. Craft, 49 Miss. 480, 19 Am. Rep. 4. In Railroad Co. v. McComas, 33 Ill. 186, it was ruled: "Where goods are shipped upon a railroad for transportation, the consignor may sue for their nondelivery, though he be but a bailee. He has such a special property in the goods as to give him a right of action. So may the real owner sue, and so may the consignee." It was ruled further in that case that, whichever of these three first obtains damages, it will be in full satisfaction of the claims of the others.

We have not undertaken to collate here all of the cases bearing upon this question. Many of them, perhaps nearly all, are cited in the decisions above referred to. The following also support the ruling made in the present case: Cobb v. Railroad Co., 38 Iowa, 601 (Syl. point 8); Dows v. Cobb, 12 Barb. (N. Y.) 310; Harvey v. Railroad Co., 74 Mo. 539; Atchison v. Railway Co., 80 Mo. 213; Moore v. Sheridine, 2 Har. & McH. (Md.) 453; Express Co. v. Caperton, 44 Ala. 101, 4 Am. Rep. 118; Railway Co. v. Smith, 84 Tex. 348, 19 S. W. 509; Railway Co. v. Scott, 4 Tex. Civ. App. 76, 26 S. W. 239; Railroad Co. v. Emrich, 24 Ill. App. 245; Packet Co. v. Shearer, 61 Ill. 263; Brill v. Railway Co., 20 U. C. C. P. 440; Moran v. Packet Co., 35 Me. 55; Cantwell v. Express Co., 58 Ark. 487, 25 S. W. 503; Goodwyn v. Douglas, Cheves (S. C.) 174; 3 Enc. Pl. & Prac. 826; Hutch. Carr. § 724 et seq.; Parks v. Railway Co. (Tex. Civ. App.) 30 S. W. 708; Railway Co. v. Barnett (Tex. Civ. App.) 26 S. W. 782; Davis v. Southeastern Line, 126 Mo. 69, 28 S. W. 965.

There are a few cases which seem to hold that the sole right of action against a carrier for loss of or injury to goods is in the consignee, notwithstanding a contract of carriage was made with the consignor. It would not be profitable to attempt to reconcile these decisions. Some of them, however, will be found upon examination to

refer to actions ex delicto brought by the consignee as the real owner of the goods. Those which do hold that the consignor cannot maintain an action for a breach of a contract made by the carrier with him are, as has been seen above, against both principle and the great weight of authority, and ought to be disregarded. So far, however, as the present case is concerned, the plaintiff was both consignor and consignee, and the real owner was a party entirely unknown in the transaction. We prefer, however, to place our decision upon the ground that, as the plaintiff was the agent of the real owner of the goods, and had charge of the same, he was authorized to enter into a contract of shipment with the carrier; and that, having entered into this contract, the legal interest therein was vested in him, and he could sue for its breach. The decision of this court in Lockhart v. Railroad Co., 73 Ga. 472, 54 Am. Rep. 883, does not conflict with anything ruled in the present case. The plaintiff in that case had no contract with the carrier, and had no interest whatever in the property. * * *

II. The Form of Action[3]

WERNICK v. ST. LOUIS & S. F. R. CO.

(St. Louis Court of Appeals, Missouri, 1908. 131 Mo. App. 37, 109 S. W. 1027.)

GOODE, J.[4] The instruction given on plaintiff's request advised the jury that if the "mules were injured by or in consequence of the negligence or carelessness of the defendant company to ship them according to contract" the verdict should be for plaintiff. This instruction jumbled tort and contract as theories of the case, authorizing a verdict for plaintiff if there had been a tortious breach, so to speak, of the contract of shipment. The essence of this contract, so far as the case in hand is concerned, was the promise of the agent at McMullen to send the mules by the through freight train due at 10 o'clock in the morning. Violation of this engagement would entitle plaintiff to damages under a proper pleading. Ill. Cent. R. R. Co. v. Waters, 41 Ill. 73; International, etc., R. R. Co. v. Ritchie (Tex. Civ. App.) 26 S. W. 840; Ayres v. Railroad, 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226. It is insisted for defendant the case stated in the complaint is in tort for negligence, instead of assumpsit for a breach of the agreement, and therefore the court erred in permitting a verdict against defendant for not shipping the mules, as agreed, by the through train. The instruction required the jury to find the mules were injured in conse-

[3] For discussion of principles, see Dobie, Bailm. & Carr. § 155.

[4] The statement of facts and parts of the opinion have been omitted.

quence of the negligence of defendant in not shipping them according to contract. There was no proof of the breach of any duty by defendant, except failure to send the goods by the first train—no proof of loss of any of the animals or damage to them by tortious conduct of defendant's servants after they were delivered to it, but whatever loss plaintiff suffered resulted from the delay in forwarding them.

Several questions are for decision: Whether the complaint is in contract or tort; if in tort, what proof supports it and what will not; and the propriety of the main instruction for the plaintiff. Generally, damages for delay in shipment or loss of property while in a carrier's custody may be recovered either in an action ex contractu or one ex delicto, at the option of the pleader. The latter is the more common proceeding, the action being in the nature of trespass on the case under the common-law system of pleading. Clark v. Railroad, 64 Mo. 446; Lupe v. Railroad, 3 Mo. App. 77; Heil v. Railroad, 16 Mo. App. 363; 3 Ency. Pl. & Pr. 818. The form of the action is occasionally material under the code system, among other reasons, because, though the pleader usually may elect for either contract or tort, he must recover on the theory adopted in his pleading. Dry Goods Co. v. Warden, 151 Mo. 578, 52 S. W. 593. We will have occasion to consider the limits within which the election may be exercised, and whether or not in exceptional instances the facts exclude the use of one of the procedures and require the other.

We must first determine where the present action falls. Law writers have remarked on the frequent difficulty of deciding, in such cases, whether the declaration states a case ex contractu or ex delicto; and as might be expected, contrary judgments have been pronounced on similar pleadings. 3 Ency. Pl. & Pr. 821. It is said in the opinion in Smith v. Seward, 3 Pa. 342, 345, that the law of this subject has been put on satisfactory ground by "making the presence or absence of an averment, not of promise only, but of consideration also, the criterion." This ruling and the one it relies on (Corbett v. Packington, 6 Barn. & Cres. 268) have been much invoked as authority. 3 Hutchinson, Carriers (M. & D. Ed.) § 1328, Orig. Ed. § 744. If the injury declared on arose from the breach of an express or implied contract, it is said the pleader, if he would proceed in case instead of assumpsit, must refrain from laying a promise. 21 Ency. Pl. & Pr. 913. And, again, that averments either ex contractu or ex delicto are not decisive of the nature of the action. Id. 657, 658. The complaint before us says nothing of a contract. It alleges plaintiff delivered the mules to defendant for shipment for a reward and paid the freight charges, thereby stating a consideration; but contains no allegation of a promise by defendant with reference to transporting the animals. Moreover, after charging "neglect and refusal" of the defendant to ship the mules on the date they were delivered, not on a date promised, the complaint says plaintiff was damaged in consequence of the refusal in the sum stated.

Among the badges of a declaration in assumpsit are averments of the essential elements of the contract declared on and a breach of some contractual stipulation. 21 Am. & Eng. Ency. Law, 659, 660. Because the complaint, though it asks damages for defendant's neglect to ship the mules on the date they were delivered, nowhere alleges a promise to ship them on said date, we consider the case stated was in tort, and think we are supported in our opinion by the precedents in this state and some others, but concede there are precedents to the contrary. Lupe v. Railroad, 3 Mo. App. 77; Heil v. Railroad, 16 Mo. App. 363; Glasscock v. Railroad, 86 Mo. App. 114; Clark v. Railroad, 64 Mo. 440; Rideout v. Railroad, 81 Wis. 237, 51 N. W. 439; Bowers v. Railroad, 107 N. C. 725, 12 S. E. 452. In the Lupe and Glasscock Cases, the pleadings for the plaintiffs stated a consideration for the contracts of carriage, yet nevertheless the cases were held to be in tort and the opinion in the Heil Case indicates the same view was taken of the petition therein because it set out no contract of shipment.

We hold the action is in tort and not in assumpsit. * * * But we think there is a growing tendency to distinguish the two remedies, and refuse the one in tort if the gist of the grievance is a breach of a duty existing only by force of a contract. The line of demarcation grows more vivid in the later opinions, and runs between violations of obligations imposed solely by contract and those imposed by law, without, or concurrently with, a contract. If the law of its own policy fastens a duty on a person or class of persons, and this duty is violated, an action in tort may be maintained by the party aggrieved, even though he has taken a stipulation for the observance of the duty. But if the breach is of a duty arising solely from a contract, and only noticed by the law because it redresses breaches of contractual obligations, in our judgment the weight of modern authority is against the view that an action in tort for damages will lie. In such instances assumpsit is the appropriate remedy and an ample one. * * *

We quote from a modern author: "In certain relations which are usually entered into by contract, the law imposes a duty that arises from the relation rather than the contract, and if the duty be disregarded, the one who suffers may sue upon the agreement, or may treat the wrong as a tort, and bring an action analogous to that of trespass on the case. This duty arises on the part of carriers, innkeepers, attorneys, physicians, farriers, and other skilled mechanics, etc. * * * If there be no legal duty except as arising from the contract, there can be no election—the party must rely upon the agreement. Thus, if one agree to take the charge and superintendence of a farm for a year, and to take charge and care of the stock, etc., there is no legal duty outside the contract; and an action, as on the case for tort, will not lie for his negligence. If one agrees to board a horse for another and keep him in a separate stall, and negligently put him in a stall with other horses, and he is kicked and injured in consequence, *the negli-*

gence cannot be charged as a tort, for there is no duty outside the contract." Bliss, Code Pleading, § 14. The remark italicised expresses exactly what was done in the instruction under review—a breach of the agreement to ship by the through train was treated as negligence.

Attending to the special application of the foregoing principles in actions against common carriers for delays in shipment and losses of goods, we find the books replete in statements that the party seeking redress may proceed either in contract or tort. Clark v. Railroad, 64 Mo., supra; 3 Ency. Pl. & Pr. 818; 3 Hutchinson, § 1324 of M. & D. Ed. (740 Orig. Ed.). But in this class of actions, as in others, we apprehend the right to proceed in tort exists only when the carrier's default is in respect of a duty which the law imposes even though nothing is said about it in the contract of shipment. "Where the gravamen of the declaration is solely for a breach of duty and founded on the custom (i. e., the law relating to the duties of a carrier), the action is in tort; but if the cause of action as stated is for a breach of the agreement, the action is on contract." See 3 Ency. Pl. & Pr. 821, and cases cited. Also: "It may be stated as an abstract proposition that where the duty of a common carrier to a passenger is not one which is implied by law by reason of the relation of the parties, but depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract and not in tort; but where the duty is implied by law by reason of the relation of the parties, or where the passenger sustains an injury by reason of the breach of a duty which the railroad owes to the public in general, the remedy is in tort." 15 Am. & Eng. Ency. Law, p. 1121. "Unless the contract imposed on the carrier some duty or obligation in respect of goods *which the law itself would not impose* (all italics ours), and which would be to some advantage to the plaintiff in an action, there can be no reason why it should not be based upon the contract rather than upon the duty." 3 Hutchinson, Carriers (M. & D. Ed.) § 1331. "As a general rule where there is a breach both of contract *and of a duty imposed by law,* as in case of loss or injury by a common carrier, the plaintiff may elect to sue either in contract or tort." 4 Elliott, Railroads, § 1693. And see * * * Chitty's Pleadings (page 153); also 28 Am. & Eng. Ency. Law, 625, 632.

The following cases against carriers support the above excerpts from text-writers: Kimball v. Railroad, 26 Vt. 247, 62 Am. Dec. 567; Arnold v. Railroad, 83 Ill. 273, 280, 25 Am. Rep. 386; Nevin v. Car Co., 106 Ill. 222, 46 Am. Rep. 688; Boaz v. Railroad, 87 Ga. 463, 13 S. E. 711; Nicoll v. Railroad, 89 Ga. 260, 15 S. E. 309; Clark v. Railroad, and Heil v. Railroad, supra. In Emigh v. Railroad, 4 Biss. 114, Fed. Cas. No. 4,449, the court said: "As I understand it, the subjects proper for action on the case are of two distinct classes. First, where there is a tort committed, without force, on the person, character, or property of the plaintiff, entirely unconnected with any contract. Secondly, when there is a contract, either express or implied, *from which a*

common-law duty results, an action on the case lies for a breach of that duty; in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the gravamen of the action."

Applying the foregoing doctrine to the facts of the present case, we find the agreement breached (i. e., to ship plaintiff's mules in the morning by the through freight) did not create a duty which the law would imply independently of the agreement. The obligation implied by law was not that the company would ship by said train, but would ship without unreasonable delay. Hence we hold that, for plaintiff to recover for defendant's refusal to forward according to the agreement, he must sue in contract. We hold, too, that the remedy in tort could not be made available by merely charging the breach of the agreement in a tortious form; i. e., that defendant neglected to ship the mules according to contract. Neither can the statement be amended in the circuit court to change the case from one in tort to one in contract, as the amendment would substitute a new cause of action for the one tried before the justice. Hansberger v. Railroad, 43 Mo. 196. We are mindful that the rules of pleading are relaxed in favor of complaints before magistrates; but the present complaint does not refer to a contract, and to amend it so as to set one forth and declare for a breach of it is not permissible.

If we are correct in the foregoing views, plaintiff can recover on his statement, only by proving defendant negligently delayed forwarding his mules for an unreasonable time after they were delivered to it. Douglass v. Railroad, 53 Mo. App. 473; Goldsmith v. S. S. Co. (D. C.) 37 Fed. 806. As the agent had directed plaintiff to bring his mules to the station for shipment, it was the legal duty of defendant to ship them in a reasonable time after arrival, even if the alleged promise to do so by the through train was not made. What was a reasonable time should have been left to the jury, if plaintiff's recovery must hang on the duty imposed by law in the absence of an agreement as to the time of shipment. It is not for a court to pronounce that, in order to avoid unreasonable delay, the defendant was bound to ship the animals by the first train, or even on the day they were delivered. If no agreement controlled the matter, defendant was not bound to ship by a train which did not accept freight except under a special order at the station. 4 Elliott, Railroads, § 1555; Pennsylvania Co. v. Clark, 2 Ind. App. 146, 27 N. E. 586, 28 N. E. 208. Whether or not defendant fell short of its legal duty as a common carrier, in not moving the mules the day they were delivered, depends on the cause of the delay, which may have happened without the fault of the defendant. Delays of a carrier have a different status in law from a failure to carry safely, which is excused only when due to inevitable accident or the public enemy. 2 Hutchinson, Carriers (M. & D. Ed.) § 653. Delay alone does not establish negligence. Ecton v. Railroad, 125 Mo. App. 223, 102 S.

W. 575. And as negligence is the gist of the case plaintiff must establish it in order to recover. McCrary v. Railroad, 109 Mo. App. 569, 83 S. W. 82; Witting v. Railroad, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636.

Instructing that neglecting to ship the mules "according to contract" rendered defendant liable cannot be regarded as a proper submission of the facts on the issue of a tortious breach of duty. The jury should be left to say whether defendant's duty as a carrier to forward with reasonable dispatch was performed; without referring them to a promise to forward on a certain date, which imposed an additional contractual duty. As regards defendant's observance of its legal duty, the essential inquiry is, was there an unreasonable delay? not, was there a delay beyond the date the parties agreed on for shipment?

The judgment is reversed, and the cause remanded. All concur.

III. The Pleadings [5]

LANG v. BRADY.

(Supreme Court of Errors of Connecticut, 1901. 73 Conn. 707, 49 Atl. 199.)

Action by Joseph H. Lang against Bernard Brady. From a judgment in favor of defendant, plaintiff appeals.

HAMERSLEY, J. A common carrier is one whose business is to carry for hire from one place to another the goods of all persons indifferently. The law (except as modified by statute or contract) imposes upon common carriers a duty, as incident to their occupation, to carry and deliver at their destination the goods transported by them in the exercise of their business safely, and makes them liable for all losses in respect to such goods, unless they arise from the act of God or the public enemy. The complaint in this case alleges that the defendant is a common carrier; that the plaintiff delivered to him as such common carrier certain specified goods to be carried from 81 Green street to 137 Congress avenue, and there delivered to the plaintiff, for hire; that the defendant neglected his duty in that he did not safely carry and deliver said goods; and that the different articles carried were injured by default of the defendant, to the damage of the plaintiff. The defendant demurred to the complaint—First, because the facts alleged do not show that the defendant was under any obligation to give to the goods the care alleged, and do not show that the defendant failed to perform any duty he was under in respect to said

[5] For discussion of principles, see Dobie, Bailm. & Carr. § 156.

goods; and, second, because the complaint alleges that the several articles specified were injured by default of the defendant, without stating any facts to show in what his default consisted. The court below sustained the demurrer.

We think it should have been overruled. As to the first ground, the demurrer is too general to reach any defect in the mere form of statement, and the complaint is plainly good in substance. The duty to carry the goods safely is one implied by law, and need not be alleged. The delivery of the goods to the defendant as a common carrier, and his failure to carry them safely, is directly alleged; and the acceptance of the goods by the defendant, if not directly alleged, is certainly alleged inferentially. If the complaint is open to objection in this respect, the defect is at most one of form, and is not specified in the demurrer. As to the second ground, this action is for the breach of the duty imposed upon common carriers by law independently of contract, and allegations of particular acts of negligence are unnecessary. It is sufficient that the goods were injured while in the care of the defendant as a common carrier. There is error. The judgment of the court of common pleas is reversed, and the cause remanded for further proceedings according to law. The other judges concurred.

IV. The Evidence [6]

FOCKENS et al. v. UNITED STATES EXPRESS CO.

(Supreme Court of Minnesota, 1906. 99 Minn. 404, 109 N. W. 834.)

Action by Edward J. Fockens and others, copartners as Fockens Bros., against the United States Express Company. Verdict for plaintiffs. From an order denying a new trial, defendant appeals.

LEWIS, J. June 22, 1903, respondents delivered to appellant company at Winona, Minn., 30 crates of strawberries, consigned to Andrew Schoch of St. Paul, and on the afternoon of the 24th delivered a second shipment of 28 crates, consigned to the same party. The first shipment arrived in St. Paul about 10 o'clock on the evening of the 22d, and was delivered to the consignee between 8 and 9 o'clock the next morning, and refused by him upon the ground that the berries were in a damaged condition. The second shipment arrived during the evening of June 25th, and was delivered to Schoch the following morning, and refused for the same reason as the first shipment. This action was commenced to recover damages alleged to have been occasioned by the negligent handling of the berries.

[6] For discussion of principles, see Dobie, Bailm. & Carr. § 157.

1. There was evidence in the case to the effect that the berries were in good condition and not overripe when delivered to the carrier at Winona, and that upon their delivery to the consignee in St. Paul they were in a soggy condition, and had settled down and caked, and the juice had run all over the boxes and crates. Respondents relied upon the rule of law that if the berries were in good condition at the time of delivery to the carrier at Winona, and in a damaged state when received by the consignee in St. Paul, then the burden was upon the carrier to prove that such damage was not occasioned by any negligent act on its part. The evidence upon this branch of the case is not very satisfactory. The berries were grown about 17 miles from Winona. The first shipment was picked the 21st of June, boxed and crated, and taken to Winona in an ordinary wagon over an ordinary country road, leaving about 3, and arriving at Winona between 7 and 8 o'clock on the morning of the 22d. A considerable portion of the berries were sold from respondents' store at retail, and about noon of that day 30 crates were nailed up and delivered to the express company for shipment to St. Paul. It does not appear where the berries were kept from the time they were delivered to appellant until they went out on the 6:30 evening train; but they were under the exclusive control and management of the express company. One witness testified that the boxes were roughly handled in loading, that they were thrown from the truck into the express car, and that the crates were piled in the car like cordwood. On the other hand, it was shown that in this instance the crates were received and piled in the car in the usual manner, and upon delivery at St. Paul were put upon trucks, wheeled into appellant's warehouse, and the crates separated, so as to allow circulation of air, and remained there until the following morning, when they were delivered to the consignee. There was no evidence that any of the boxes were broken or jammed. The weather was not particularly warm, the thermometer running from 82 to 88 degrees, although there was considerable humidity in the air, and it was shown that the natural tendency of ripe berries under such conditions was to rapidly deteriorate. There was some evidence to indicate that during that kind of weather ripe fruit should be carefully handled in order to avoid any jarring which might cause the berries to settle or sink down, and that during foggy or damp weather such fruit keeps better when not exposed to the air. From all the evidence, we are unable to say that it conclusively appears that the carrier did not substantially contribute to the damage by the manner in which it handled the fruit.

2. While it was hardly permissible to designate the natural tendency of berries to disintegrate under unfavorable climatic conditions as an act of God, the court later on made it clear that if the berries were damaged by reason of their tendency to deteriorate, considering their condition and the weather, and if the company was not negligent in handling the fruit, then there would be no liability. Such we con-

ceive to be the essence of the rule as finally given to the jury. That the shipper makes out a prima facie case when he proves that the goods were delivered to the carrier in a good condition and to the consignee in a damaged state, and the carrier is then called upon to prove that the damage did not arise by any negligence on its part, has often been declared the proper rule governing such cases. In Shriver v. Sioux City, etc., Ry. Co., 24 Minn. 506, 31 Am. Rep. 353, it was said that it is a rule of evidence that things once proved to have existed in a particular state are presumed to have continued in that state until the contrary is shown, and because of the superior ability of the carrier to furnish the proof as to how the damage occurred, there is nothing unreasonable in requiring the carrier to assume the burden of so doing. To the same effect, see Lindsley v. C., M. & St. P. Ry. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692; Hull v. C., St. P., M. & O. Ry. Co., 41 Minn. 510, 43 N. W. 391, 5 L. R. A. 587, 16 Am. St. Rep. 722; Boehl v. C., M. & St. P. Ry. Co., 44 Minn. 192, 46 N. W. 333; Shea v. M., St. P. & S. S. M. Ry. Co., 63 Minn. 228, 65 N. W. 458; Smith v. G. N. Ry. Co., 92 Minn. 12, 99 N. W. 47; Beede v. W. C. Ry. Co., 90 Minn. 36, 95 N. W. 454, 101 Am. St. Rep. 390; Calender-Vanderhoof Co. v. C., B. & Q. Ry. Co. (filed November 2, 1906) 99 Minn. 295, 109 N. W. 402. While in some of these cases the burden of proof is said to shift to the carrier, which is not strictly accurate, there can be no doubt of the intention conveyed by the language. Whenever the plaintiff makes out a prima facie case, he is entitled to rest, and the defendant is then called upon to meet the proofs and show the contrary. In cases of this character, the rule wisely calls upon the carrier to meet the presumption of negligence by showing a state of circumstances which otherwise accounts for the damage, and this it must do by a preponderance of evidence.

Order affirmed.

V. The Measure of Damages [1]

MOBILE, J. & K. C. R. CO. v. ROBBINS COTTON CO.

(Supreme Court of Mississippi, 1909. 94 Miss. 351, 48 South. 231.)

Action by the Robbins Cotton Company against the Mobile, Jackson & Kansas City Railroad Company. Judgment for plaintiff, and defendant appeals.

WHITFIELD, C. J. The appellee sued the appellant to recover the value of 17 bales of cotton which it is alleged the appellant had

[1] For discussion of principles, see Dobie, Bailm. & Carr. §§ 158–163.

failed to deliver to it according to its contract, manifested by bills of lading set out in the record. The testimony, we think, establishes sufficiently the failure to deliver the cotton sued for. The plaintiff attached to its declaration an exhibit, which is a bill of particulars, showing the various parties from whom it purchased the 17 bales of cotton, the numbers of the bales of cotton, the places of shipment of the cotton along the line of the appellant's railroad, the weights of the cotton, and the prices paid by the appellee for the cotton per pound, running all the way from 7½ cents to 10¼ cents per pound, and the value of each bale of cotton, making in the aggregate the amount paid by appellee for the 17 bales to be $798.66. Not a particle of proof was introduced on either side to show what the market value of the cotton was at the time of the purchase and shipment. Not a witness was asked a question in relation to this market value of the cotton.

The plaintiff, whether inadvertently or not, wholly omitted to make this proof, and relies here upon the proposition that, since there is no other evidence in the record than the prices paid by the appellee, that is sufficient evidence of such market value, and the plaintiff obtained from the court the following instruction: "The court instructs the jury, for the plaintiff, that if they believe from the evidence that the plaintiff had delivered to the defendant railroad company, at the different stations named, the 17 bales of cotton alleged to have been delivered for shipment, and that said cotton was not delivered to it, or to the compress company for it, and it did not receive said cotton from the railroad company, nor any other cotton in lieu thereof, the jury must find for the plaintiff, and assess the damage at the price paid by them for said cotton, and for the freight paid the railroad company thereon, and 6 per cent. interest per annum on said amount from the date of said failure to so deliver said cotton."

We cannot concur in the argument of appellee in support of this instruction. It is very easy to imagine a case, which might very readily occur, in which the purchaser of cotton might actually pay two or three times the market value of cotton in order to meet some contract of delivery of cotton, upon the meeting of which contract his credit and business entirely depended. Again, a purchaser might pay, being a bad judge of cotton, very much more for cotton than its market value. Manifestly, all that he could recover of the carrier for the failure to deliver would be, not what he might pay, but what the market value of the cotton was.

It follows that this first instruction is fatally erroneous, and for that reason the judgment must be reversed, and the cause remanded.

McGRATH et al. v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina, 1912. 91 S. C. 552, 75 S. E. 44, 42 L. R. A. [N. S.] 782, Ann. Cas. 1914A, 64.)

WOODS, J. The plaintiffs, blacksmiths and wheelwrights at McCormick, S. C., purchased in Savannah, Ga., two lengths of steel shafting and other hardware. The goods were shipped over the defendant's railroad, and, on arrival at McCormick, the shafting was found to be so bent as to be unfit for the use intended. The plaintiffs refused to receive the shafting from the carrier, and duly presented their claim for $7.15, the entire value of the two pieces, and $.77 freight. The defendant having failed to pay the claim, this action was brought in the magistrate's court for $7.90 and $50, the statutory penalty.

The only witness in the case was J. T. McGrath, one of the plaintiffs, who testified that the bent shafting was of no use to the plaintiffs, but that it was worth 25 to 35 cents a hundred pounds as old iron.

Defendant's counsel asked the magistrate to instruct the jury to find a verdict for the plaintiff for the amount of the claim, $7.90, less 25 cents a hundred pounds, the value of the shafting as old iron. This request was refused, and defendant then requested the following charge: "That, because property is damaged in shipment, a person cannot abandon it as long as it has a value, but must receive the same, and, if he cannot use it, must sell for its market value at the nearest market, and the amount it brings or would bring must be deducted from the value or the cost of the article in estimating the damage." The magistrate refused this and other similar requests, and charged the jury "that, if the jury find that the shafting was of no value to the plaintiff, he had a right to refuse to accept it and sue for the value." The jury found a verdict for $57.92, the whole amount of the claim and the statutory penalty; and, on appeal, the judgment of the magistrate's court on the verdict was affirmed by the circuit court.

We think the legal proposition relied on by defendant's counsel is sound and well established by authority in this state and elsewhere. A carrier having goods in possession for transportation acquires no title to them. As the goods remain the property of the owner, his right of action against the carrier is for the entire value of the goods if lost or made entirely worthless by the carrier's default; and, in case of destruction of value, the recovery is not affected by the owner's acceptance or his refusal to accept the goods. On the other hand, if the value is merely impaired by actual injury in the hands of the carrier, or by delay in the carrier, the consignee is bound to receive the goods; and his right of action is limited to the impairment of value due to delay in carriage or injury to the goods. In Nettles v. S. C. R. R. Co., 7 Rich. (S. C.) 190, 62 Am. Dec. 409, the action was for the value

of a shipment of wool hats which were much injured by being boxed up for several months, when they should have been transported and delivered in a few days. The court held: "The goods, even after great delay in the carriage of them, belonged to the plaintiff. When they were tendered to him, he should have accepted them; and thereby the extreme measure of damages would have been reduced by deduction therefrom of the value of the goods, according to their condition at the time and place of tender." It will be observed that the point involved in that case was not loss resulting from mere delay in delivery, but from actual injury to the goods received in the course of transportation. Indeed, on the point under discussion, it is impossible to distinguish in principle between damage due to delay and damage due to impairment of value by physical injury to the goods. Neither the actual injury nor the delay in transportation amounts to conversion as long as the goods retain a substantial value.

The rule was applied to delayed freight in Cousar v. So. Ry., 82 S. C. 307, 64 S. E. 391, and in Bullock v. C. & W. C. Ry., 82 S. C. 375, 64 S. E. 234. In Shaw v. S. C. R. R. Co., 5 Rich. (S. C.) 462, 57 Am. Dec. 768, a considerable quantity of a shipment of molasses had leaked out because of injury to the casks in the course of transportation. The court, holding that the consignee must receive the molasses that was left and sue for the value of that which leaked out, quoted with approval the following statement of the principle made in Smith v. Griffith, 3 Hill (N. Y.) 333, 38 Am. Dec. 639: "If goods are wholly lost or destroyed, the owner is entitled to their full worth at the time of such loss or destruction. In trover the measure of damages is the value of the goods at the time and place of conversion, with interest, or, perhaps, at any time between that and the trial. And, upon the same principle, if the goods are partially injured, and the party seeks redress for the qualified damage, the measure should be in like proportion." The court recognized and applied the same principle in Miami Powder Co. v. Port Royal, etc., Ry. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123, and in Wall v. Atlantic Coast Line R. R. Co., 71 S. C. 337, 51 S. E. 95. These cases are in accord with the authorities elsewhere. 3 Hutchinson on Carriers, 1365, 1372; Mich. Co. v. Bivens, 13 Ind. 263; Gulf Co. v. Pitts, 37 Tex. Civ. App. 212, 83 S. W. 727; Gulf Co. v. Everett, 37 Tex. Civ. App. 167, 83 S. W. 257; Silverman v. Ry., 51 La. Ann. 1785, 26 South. 447; Dudley v. Railway, 58 W. Va. 604, 52 S. E. 718, 3 L. R. A. (N. S.) 1135, 112 Am. St. Rep. 1027; Parsons v. U. S. Express Co., 144 Iowa, 745, 123 N. W. 776, 25 L. R. A. (N. S.) 842.

The case of Berley v. C. N. & L. R. R. Co., 82 S. C. 232, 64 S. E. 397, was relied on by respondents' counsel as holding that a consignee could refuse to receive goods injured in transportation, but still having a substantial value, and recover the full value. It is perfectly obvious from the following language of the decree that the recovery

was allowed on the ground that the evidence admitted of the inference that, when the goods arrived, they had no substantial value. "The defendant first submits the point that the plaintiff could not recover $1.84, the entire amount of the claim, because the evidence for the plaintiff shows that the entire value of the piping was only $1.84, that it was not lost but only injured, and that, after the injury, it was of some value. The plaintiff, Kyzer, testified the piping was so broken as to be of no value to him, though 'it might have been worth something to somebody.' This mere conjecture of value by the plaintiff does not warrant this court in holding there was no evidence to support the judgment of the magistrate that the piping was a complete loss, especially when it is considered that Hook, defendant's agent at Irmo, testified the defendant admitted and allowed the whole claim after investigation."

Still we do not think there should be a reversal in this case. While there can be no doubt that, if the shafting in its bent condition had a substantial value, the consignees were bound to receive it and give the carrier credit for the net amount realized from its due disposition, when the evidence is looked at in a practical way we think it shows that the shafting could not have had any appreciable net value in the hands of the consignees. According to the evidence, it had no value except as old iron, worth from 55 to 77 cents. The actual outlay for handling and delivery to a purchaser would not have been much less than this small sum, so that the net value of the bent shafting in the hands of consignees, if anything at all, was too insignificant to count in the practical administration of justice. As the judgment must be affirmed on the undisputed evidence in the case, it is unnecessary to consider the exception charging error in the admission of testimony that the defendant offered to pay the claim without the penalty.

The judgment of this court is that the judgment of the circuit court be affirmed.

MATHESON v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, 1908. 79 S. C. 155, 60 S. E. 437.)

WOODS, J. In this action the plaintiff, A. W. Matheson, seeks to recover of the Southern Railway Company $1,995 for the loss of two tons of fertilizer; the position taken being that the facts warrant the recovery of both special and punitive damages in addition to the value of the goods lost. The circuit judge directed a verdict for the defendant. The inquiry, then, is whether there was any evidence upon which a verdict for any amount in favor of the plaintiff could have been rendered.

These were the undisputed facts before the court: The plaintiff in March, 1905, bought of Springs & Shannon, merchants at Camden, two tons of Pocomoke guano, to be shipped to him at Ridgeway,

paying them the purchase money, $32.36, in cash. Springs & Shannon immediately thereafter, on 24th March, 1905, bought two tons of fertilizer from Pocomoke Guano Company, which company, as directed by Springs & Shannon, delivered the guano to the defendant railway company consigned to the plaintiff at Ridgeway, S. C. The guano company had no contract with the plaintiff, and sent the bill of lading, which named the plaintiff as consignee to Springs & Shannon. After shipment the plaintiff inquired for the guano a number of times at defendant's Ridgeway freight office, and informed the defendant's local agent of his intention to use it on his crop, and of the necessity for him to have it in time. The agent promised to send a tracer for the guano, and the evidence of the officers of the railway company that diligent effort was made to find and deliver the guano was undisputed. The plaintiff testified he waited on the guano until he was convinced, if it came at all, it would be too late for the use he wished to make of it, and then demanded and received back from Springs & Shannon the purchase price. The plaintiff further testified he was unable to procure guano after it became manifest this fertilizer would not be delivered, and that the yield of his land was far less than it would have been if he had been able to use the guano. After repayment to the plaintiff, Springs & Shannon returned the bill of lading to the Pocomoke Guano Company, and received credit on their books for the price of the guano. Thereupon the Pocomoke Guano Company demanded and received from the defendant railway company $32.36, the value of the goods at Norfolk.

There is no foundation for special damages. The evidence discloses nothing more than an ordinary shipment of fertilizer, with no notice to the carrier at the time it received the goods of any special use to which it was to be applied, or of such scarcity of fertilizer as to prevent the purchase of two tons of other guano by the plaintiff. Traywick v. Railway Co., 71 S. C. 82, 50 S. E. 549, 110 Am. St. Rep. 563; Wesner, etc., Co. v. Railway, 71 S. C. 211, 50 S. E. 789; Guess v. Railway Co., 73 S. C. 264, 53 S. E. 421; Strange v. Railway Co., 77 S. C. 182, 57 S. E. 724. In McKerall v. Railroad Co., 76 S. C. 342, 56 S. E. 965, the following language from 6 Cyc. 450, is quoted with approval: "Subsequent notice, however, of the effect of the further delay after the goods should have been delivered may render the carrier liable for damages accruing after that time by reason of negligence in not tracing and finding the goods." Assuming that there was notice given of special emergency after the shipment, there was not a particle of evidence of negligence in not tracing and finding the goods. On the contrary, there was undisputed evidence of diligent and prompt effort to find and deliver. The case as to special damages therefore entirely fails. So far from there being evidence of reckless or willful disregard of plaintiff's rights or even indifference to them, all the testimony on the subject tended to show a loss by theft from the carrier or by some mistake, which the defendant after

diligent effort could not account for. To allow punitive damages under such conditions would not only be unjust, but result either in bankruptcy to common carriers or such increase in freight rates as to impose an intolerable burden on the business of the country.

The remaining question is whether there was any evidence of actual damages recoverable by the plaintiff. The plaintiff, it is true, paid in advance for two tons of Pocomoke guano, but the sellers undertook to deliver it to him at Ridgeway; and until delivery at that place ownership did not pass to the buyer, for the goods were still at the risk of the seller, loss, if any, falling on him. The general rule is that delivery to the carrier is delivery to the consignee, and on such delivery the title passes to the consignee. The goods being then at consignee's risk, he has the right of action for their loss. But, where the vendor undertakes to deliver at a certain place, the carriage of the goods to that place is at his risk, and the title and right of action for their loss remains in him. Parker v. Jacobs, 14 S. C. 116, 37 Am. Rep. 724; Elliott on Railroads, § 1692; Benjamin on Sales, § 1040; Hale on Carriers, p. 547; 6 Cyc. 511; 24 Am. & Eng. Enc. 1050; McNeal v. Braun, 53 N. J. Law, 617, 23 Atl. 687, 26 Am. St. Rep. 441, and note; Detroit, etc., R. R. Co. v. Malcomson, 144 Mich. 172, 107 N. W. 915, 115 Am. St. Rep. 390; Neimeyer L. Co. v. Burlington & M. R. R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 535. The remedy of the purchaser in such case is against the seller who has failed to perform the contract of sale.

But, if the law were otherwise on this point, the action of the plaintiff in demanding and receiving from Springs & Shannon the purchase money of the fertilizer cannot be viewed in any other light than a rescission of the sale, leaving the fertilizer, wherever it might be, on their hands. Even if the title had ever passed from Springs & Shannon, as between them and the plaintiff, by this rescission it went back to them, and with it the right of action for the loss. 4 Elliott on Railroads, 1692; Turney v. Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 516, and note; Hutchinson on Carriers, § 1319; Railway Co. v. Com. Guano Co., 103 Ga. 590, 30 S. E. 555.

In addition to this, the plaintiff having received back from the seller the purchase price, $32.36, and the carrier having refunded that sum to the seller in full settlement, the rightful demands of all parties were met before this suit was brought. True, there was evidence that the fertilizer was worth $1.50 per ton more at Ridgeway than plaintiff had paid for it, and it was contended he was at least entitled to recover this difference in market value; but, if there were no other difficulty in the way of the recovery of this difference in value, the bill of lading fixes the liability of the carrier for loss at the value of the goods at the point of shipment, which in this case was Norfolk, Va. As a general rule, liability for the loss of goods by the carrier is measured by the value at the place of destination. Wallingford v. Railroad Co., 26 S. C. 268, 2 S. E. 19; Turner v. Railroad

Co., 75 S. C. 58, 54 S. E. 825, 7 L. R. A. (N. S.) 188; McKerall v. Railroad Co., 76 S. C. 342, 56 S. E. 965. But a contract fixing the liability for loss at the value at place of shipment is held to be reasonable and valid. Live Stock Co. v. Kansas, etc., R. R. Co., 100 Mo. App. 674, 75 S. W. 782; So. Pac. Co. v. Phillipson (Tex. Civ. App.) 39 S. W. 958; 6 Cyc. 401. While this precise point was not involved, it falls within the principle laid down in Johnstone v. Railroad Co., 39 S. C. 55, 17 S. E. 512.

The judgment of this court is that the judgment of the circuit court be affirmed.

PART III

CARRIERS OF PASSENGERS

THE NATURE OF THE RELATION

I. Sleeping Car Companies [1]

PULLMAN PALACE-CAR CO. v. GAVIN.

(Supreme Court of Tennessee, 1893. 93 Tenn. 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. Rep. 902.)

McALISTER, J.[2] The object of this suit is to recover the sum of $150 alleged to have been stolen from M. Gavin while a passenger on a Pullman palace car. * * *

The law is well settled that a sleeping-car company is not a common carrier. They differ radically in the kind of service rendered the public. The contract of the sleeping-car company is to lodge the passenger, while that of the carrier is to carry him. Sleeping-car companies are not liable as inn-keepers for the loss or theft of articles from a guest, for the reason that the passenger on a sleeping-car retains the exclusive personal possession and control of his valuables. The company does not undertake to receive the property of the guest, but expressly declines to do so, and for this reason is absolved from the liability of an inn-keeper. It has been so difficult to define the precise legal status of this class of public servants, and the measure of their accountability, that they have been facetiously characterized as "flying nondescripts." It is, however, universally recognized by the courts that it is the duty of a sleeping-car company to maintain a careful and continuous watch over the interior of the car while the berths are occupied by sleepers. If the property of the passenger is stolen by a fellow passenger, or by an intruder on the train, in consequence of the failure of the company to maintain this careful and continuous watch, the company will be liable for its value. Carpenter v. Railroad Co., 124 N. Y. 58, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644.

It follows, as a corollary from this proposition, that, if the servant or agent of the company charged with the duty of watching and pro-

[1] For discussion of principles, see Doble, Bailm. & Carr. § 165.

[2] Parts of the opinion are omitted.

tecting the property of the guest purloins it himself, the company is responsible. Says Mr. Wood, in his work on Master and Servant (section 321): "In that class of cases where the master owes certain duties, either to third persons or the public, whether the same arise from contract or statutory obligations, a different rule of liability exists from that which prevails when the liability sounds entirely in tort. When, by contract or statute, the master is bound to do certain things, if he intrusts the performance of that duty to another he becomes absolutely responsible for the manner in which the duty is performed, precisely the same as though he himself had performed it, and that without any reference to the question whether the servant was authorized to do the particular act. Where the master, by contract or operation of law, is bound to do certain acts, he cannot excuse himself from liability upon the ground that he has committed that duty to another, and that he never authorized such person to do the particular act. Being bound to do the act, if he does it by another he is treated as having done it himself; and the fact that his servant or agent acted contrary to his instructions, without his consent, or even fraudulently, will not excuse him." Palace-Car Co. v. Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873.

The first assignment of error is, viz.: "There is no evidence to support the finding of the circuit judge, for the reason that the evidence introduced by the plaintiff shows that the servants of defendants were watchful and diligent, and were guilty of no negligence." The circuit judge found that the larceny was committed during Lind's watch, between 12 and 3 o'clock, and he found, further, that Lind was the guilty party. Upon an examination of the record, we find material evidence to sustain the finding of the circuit judge. * * *

LEWIS v. NEW YORK CENT. SLEEPING-CAR CO.
WING v. SAME.

(Supreme Judicial Court of Massachusetts, 1887. 143 Mass. 267, 9 N. E. 615, 58 Am. St. Rep. 135.)

These were two actions, each with a count in contract and tort. The count in contract alleged that the defendant, in consideration of the purchase by the plaintiff of a ticket which entitled him to be carried in a sleeping car of the defendant from Albany to Buffalo, undertook to provide plaintiff a berth in said sleeping car, and to see that said car was properly guarded, and that his personal baggage and effects were protected while he was asleep, but that, while plaintiff was riding in said car, through the negligence of the defendant's servant who was employed by them to care for and watch said car, and protect the baggage and personal effects of the passengers riding therein, the plaintiff's pocket-book, and a large sum of money therein, was taken from his person by some person unknown, so that he wholly lost the same. The count in tort alleged the same facts, and claimed

damages for the property stolen. At the trial in the superior court, before Thompson, J., it was agreed that the defendant owned and managed a certain sleeping car, to-wit, the car Pontiac, which was run on the Boston & Albany Railroad and on the New York Central & Hudson River Railroad. * * *

MORTON, C. J.[3] The use of sleeping cars upon railroads is modern, and there are few adjudicated cases as to the extent of the duties and liabilities of the owners of such cars. They must be ascertained by applying to the new condition of things the comprehensive and elastic principles of the common law. When a person buys the right to the use of a berth in a sleeping car, it is entirely clear that the ticket which he receives is not intended to and does not express all the terms of the contract into which he enters. Such ticket, like the ordinary railroad ticket, is little more than a symbol intended to show to the agents in charge of the car that the possessor has entered into a contract with the company owning the car, by which he is entitled to passage in the car named on the ticket. Ordinarily, the only communication between the parties is that the passenger buys, and the agent of the car company sells, a ticket between two points; but the contract thereby entered into is implied from the nature and usages of the employment of the company. A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars; and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for and make use of its cars for sleeping; all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself, or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise.

The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy and by the true interests of both the passenger and the company; and the decided weight of authority supports it. Woodruff S., etc., C. Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; Pullman Palace Car Co. v. Gardner, 3 Penny. 78; Same v. Gaylord, 23 Amer. Law. Reg. (N. S.) 788.

The notice by which the defendant company sought to avoid its liability was not known to the plaintiff, and cannot avail the defendant.

[3] Part of the statement of facts is omitted.

The defendant contends that there was no evidence of negligence on its part. The fact that two larcenies were committed in the manner described in the testimony is itself some evidence of the want of proper watchfulness by the porter of the car. Add to this the testimony that the porter was found asleep in the early morning; that he was required to be on duty for 36 hours continuously, which includes two nights—and a case is presented which must be submitted to the jury.

We have considered all the questions which have been argued in the two cases before us, and are of opinion that the rulings at the trial were correct. Exceptions overruled.

NEVIN v. PULLMAN PALACE CAR CO.

(Supreme Court of Illinois, 1883. 106 Ill. 222, 46 Am. Rep. 688.)

MULKEY, J.[4] This was an action on the case, brought by Luke Nevin, the plaintiff in error, in the Circuit Court of McLean County, against the Pullman Palace Car Company, the defendant in error, for refusing to permit him to occupy a sleeping berth in one of its cars, which had been assigned to him, and which he was ready and offered to pay for. The Circuit Court sustained a general demurrer to the declaration, and the plaintiff electing to stand by his declaration, judgment was entered against him for costs, which, on appeal, was affirmed by the Appellate Court for the Third District, and the plaintiff in error brings the record here for review.

The declaration, omitting mere formal averments and unnecessary verbiage, charges, in substance, that the plaintiff, on the 4th day of August, 1881, at Dubuque, Iowa, purchased of the Illinois Central Railroad Company for his niece, wife, and himself, respectively, three first-class passenger tickets over that company's railway, from Dubuque, Iowa, to Chicago, this State; that having provided himself with these tickets, he, together with his wife and niece, about ten o'clock of the night of that day, and just before the train from Dubuque to Chicago started out, entered a sleeping car called "Kalamazoo," belonging to and constituting a part of said train, which said sleeping car was then in the possession and under control of the defendant; that upon entering the car he engaged of the conductor of said car two lower berths, at one dollar and fifty cents each; that the conductor thereupon assigned one berth to his niece, and one to plaintiff and his wife, promising to have them made up a little later in the night; that he and his wife took the seats in the berth assigned to them, and remained sitting up, in an orderly manner, until about twelve o'clock, frequently, in the mean time, requesting the conductor to have the berths made up, so they could retire to rest, and at the

[4] Parts of the opinion have been omitted.

same time tendering to him the price agreed to be paid therefor; that on the arrival of the train at Lena, this State, about the hour just stated, plaintiff temporarily left his seat, and stepped out on the platform of the sleeper, intending to return immediately to his berth, when the conductor instantly closed and secured the outer doors of said sleeper, and thereby prevented him from again entering the same; that plaintiff endeavored to open said doors and re-enter said car, and frequently requested the conductor to permit him to do so, but that said conductor, instead of complying with his request, removed his satchel, coats, and shoes from the berth so assigned to him and his wife, to another car, and ejected the latter from said sleeper; by means of which plaintiff was compelled to take and occupy a seat in a common passenger car on said train till its arrival in Chicago, by reason of which plaintiff was deprived of his rest and sleep, in consequence of which "he became exceedingly weary and sick, and was greatly humiliated," etc.; that his expulsion from his berth in the manner stated was done wilfully and maliciously, and that the only reason assigned by the conductor for refusing the price of the berths was "that they were not made up." * * *

Since, as we have just seen, certain legal consequences affecting the question we are considering result from the exercise of certain public trades or employments, it becomes important to determine, with some degree of particularity, the true relation which the Pullman Palace Car Company sustains to the public, and to point out, so far as we are able, the difference between it and persons or companies exercising public callings or employments like those above enumerated, if, indeed, any such difference exists. Like an ordinary railway company engaged in the transportation of freight and passengers, this company transacts its entire business, so far as it relates to this case, over the various railways in this and other States. Like railway companies, it exercises special privileges and franchises granted to it by the State, and its business is transacted almost exclusively with the travelling public. Its cars on the various lines of road are extensively advertised all over the country, setting forth, in fitting terms, the accommodations and comforts they afford, rates of charges, &c., and the public are earnestly invited to avail themselves of the advantages and comforts they thus offer. In what respect, then, does this company differ in its relation to the public, so far as the present inquiry is concerned, from an ordinary railway company? No difference has been pointed out by counsel, and we are confident none can be. Why, then, should not the same principles be held to apply to it that apply to common carriers, and others in like employments, in so far as their relation to the public is the same? To say there is no precedent for it, we have just seen, is not a sufficient answer. Indeed, it has ever been the boast of the common law, that, by reason of its elasticity, it adjusts and moulds itself to meet the constant changes in the affairs of life, and that it never hesitates to apply old rules to new cases, when it is clear they

come within the reasons or principles of such rules. The business of this company in running its elegant and commodious sleepers over various lines of railways has become one of the great industries and enterprises of the country, contributing, perhaps, as much or more, than any one thing to the convenience and comfort of the travelling public. Indeed, the running of these sleepers has become a business and social necessity. Such being the case, can it be maintained the law imposes no obligations or restrictions on this company in the discharge of its duties to the public? Or, more accurately put, is it true this company owes no duties to the public except such as are due from one mere private person to another? Can it be possible that the common carrier, the ferryman, the innkeeper, and even the blacksmith on the roadside, are all, by reason of the public character of their business, by mere force of law, placed under special obligations and duties to the public which they are bound to observe in the exercise of their respective callings, while, at the same time, this company is entirely relieved from the observance of all such duties and obligations which are not expressly contracted for? We think not. To so hold would be to unjustly discriminate between parties similarly situated, and make the law inconsistent with itself, to the great detriment of the public.

If, then, this company owes any duties to the community by reason of its relation to the public, as we hold it does, manifestly one of them is, that it shall treat all persons whose patronage it has solicited with fairness and without unjust discrimination. When, therefore, a passenger, who under the rules of the company, is entitled to a berth upon payment of the usual fare, and to whom no personal objection attaches, enters the company's sleeping car at a proper time for the purpose of procuring accommodations, and in an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the company is bound to furnish it, provided it has a vacant one at its disposal. To require this of the company is merely exacting of it that which is clearly dictated by the plainest principles of justice and fair dealing. To construe the law otherwise might lead to great abuses and the grossest injustice, detrimental alike to public and private interests. Suppose, for instance, a party who, by reason of advanced age or feeble health, is unable to travel after night except in a sleeper, having an important business engagement at a distant point on a specified day, with a choice of several routes, after having examined the advertisements relating to them makes his selection of the one that has through sleepers, and accordingly arranges his time of departure so as to reach his destination by travelling day and night. At the appointed time for leaving he provides himself with a first class ticket over the road and enters the sleeper, where he finds plenty of vacant berths, and asks the conductor to assign him one, tendering the customary price therefor, but the conductor, from some private pique, or from mere wantonness, refuses

to let him have one, and by reason of such refusal he is unable to meet his business engagement, whereby he is subjected to great pecuniary loss.

Can it be said there is no remedy in such case? Certainly it can, if the law does not, under the circumstances supposed, impose upon the company the duty of furnishing berths when it has them for disposal. But, as we have already seen, such is not the law. Holding then, as we do, where there are sleeping berths not engaged, it is the duty of the company, upon the payment or the tender of the customary price, to furnish them to applicants when properly called for by unobjectionable persons, it follows the defendant was not justifiable in refusing to let the plaintiff have one for himself and wife, and it is well settled the fact there was a special contract between the company and the plaintiff, upon which an action of assumpsit might have been maintained, does not at all affect the right to recover in the present form of action, which is founded upon the defendant's common-law liability, as above stated. * * *

II. Who are Passengers[5]

WAY v. CHICAGO, R. I. & P. R. CO.

(Supreme Court of Iowa, 1884. 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431.)

ADAMS, J.[6] In April, 1881, the decedent took passage upon a freight train at Monroe, Jasper county, for Oskaloosa. In payment of his fare he presented a mileage ticket which had been issued to one R. G. Forgrave, at commutation rates. The conductor of the train, without knowledge that Way was not Forgrave, detached the coupons for his passage. Printed upon the ticket were several conditions, and also a printed acceptance of the conditions, which was signed by Forgrave, and the whole was denominated a contract. One of the conditions is in these words: "This ticket is positively not transferable, and if presented by any other than the person whose name appears on the inside of the cover, and whose signature is attached below, it is forfeited to the company." The defendant's theory upon the trial below was that the decedent was not a passenger within the meaning of the law, and asked the court to instruct accordingly. This the court refused to do, and gave an instruction in these words: "If you find from the evidence that

[5] For discussion of principles, see Doble, Bailm. & Carr. § 166.

[6] The statement of facts and parts of the opinion have been omitted.

the decedent was injured to the damage of his estate substantially as alleged, and that he was at that time riding in a caboose in the defendant's train on the mileage ticket in evidence, issued by the defendant to R. G. Forgrave, and that upon its presentation in payment for transportation the conductor of the train accepted the ticket, and recognized and treated the decedent as a passenger, the defendant's duties and obligations were, and its liabilities now are, the same as if the ticket had been issued to the decedent, whether, prior to the accident, he disclosed to or the conductor knew his identity or not." In respect to the measure of care which common carriers owe to passengers, the court gave an instruction as follows: "Common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accident to passengers. Not the utmost degree of care which the human mind is capable of inventing, but the highest degree of care and diligence which is reasonably practicable under the circumstances, is what is required."

The giving of these instructions is assigned as error. The defendant insists that the contract relied upon as constituting the relation of common carrier and passenger was obtained by imposition and virtual misrepresentation, and it being now repudiated by the company, by a denial by it of its liability, the plaintiff cannot be allowed to set it up as binding upon the company; and that if the relation of common carrier and passenger did not exist, the company did not owe the decedent the measure of care set forth in the instruction. It appears to us that the defendant's position in this respect is well taken. When the decedent presented the ticket, we must presume that he intended to be understood as claiming that he had a right to travel upon it. This claim involved the claim that he was Forgrave, for the ticket showed upon its face that no one had a right to travel upon it but Forgrave. By the presentation of the ticket the decedent falsely personated Forgrave with the intention of deceiving the company, and he did deceive it, and to its injury, for by reason of the deception he escaped the payment of the full rate with which he was otherwise chargeable. It is not material, then, that the decedent obtained the conductor's consent. Whether his consent would have bound the company if he had known that the decedent was not Forgrave, we need not require; it certainly did not under the circumstances shown. The only relation existing between the decedent and the company having been induced by fraud, he cannot be allowed to set up that relation against the company as a basis of recovery. He was, then, at the time of the injury, in the car without the rights of a passenger, and without the right to be there at all. We do not say that it is necessary that a person should pay fare to be entitled to the rights of a passenger. It is sufficient, probably, if he has the consent of

the company, fairly obtained. But no one would claim that a mere trespasser has such rights, and it appears to us to be well settled that consent obtained by fraud is equally unavailing.

The plaintiff insists that the extraordinary care described in the instruction does not become due from common carriers by reason of any contract, but simply by a rule of law which enforces the duty upon broader grounds. It is not important to inquire precisely how the duty arises. However it arises, the duty is one which the common carrier owes only to passengers; and if, as we hold, the decedent did not sustain that relation within the meaning of the law, the company did not owe that duty to him, and that is the end of the inquiry. The doctrine which we announce was very clearly expressed in T., W. & W. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613. In that case the court said: "Was defendant a passenger on that train in the true sense of that term? He was traveling on a free pass issued to one James Short, and not transferable, and passed himself as the person named in the pass. By his fraud he was riding on the car. Under such circumstances the company could only be held liable for gross negligence which would amount to willful injury."

In Thomp. Carr. Pass. p. 43, § 3, the author goes even further. After stating the rule that the relation of carrier and passenger does not exist where one fraudulently obtains a free ride, he says: "This doctrine extends further, and includes the case of one who knowingly induces the conductor of a train to violate the regulations of the company, and disregard his obligations of fidelity to his employer."

In U. P. Ry. Co. v. Nichols, 8 Kan. 505, 12 Am. Rep. 475, the defendant in error imposed himself upon the company as an express messenger, and obtained the consent of the conductor to carry him without fare. It was held that he did not become entitled to the rights of a passenger. The court, after quoting Shearman & Redfield's definition of a passenger, which is in these words: "A passenger is one who undertakes, with the consent of the carrier, to travel in the conveyance provided by the latter, other than in the service of the carrier as such"—proceeds to say: "The consent obtained from the conductor was the consent that an express messenger might ride without paying his fare. Such consent did not apply to the plaintiff" (the defendant in error). * * *

POWERS v. BOSTON & M. R. CO.

(Supreme Judicial Court of Massachusetts, 1891. 153 Mass. 188, 26 N. E. 446.)

Action by John W. Powers against the Boston & Maine Railroad for personal injuries sustained by plaintiff in a collision while riding in a caboose on one of the defendant's freight trains. The court directed a verdict for defendant, and plaintiff excepted.

DEVENS, J.[7] It is contended by the plaintiff that he was a passenger on the defendant's railroad, and entitled to all the rights of one. That he did not expect or intend to pay any fare as such, and that the conductor of the freight train into which he went did not demand or intend to demand fare, appears reasonably clear. This, however, would not be decisive if he was riding where he was when the injury happened by the authority of the defendant, or by any inducement held out to him by defendant's servants, either by its authority or while acting in the general scope of their authority, so that the plaintiff was entitled to treat their action as that of the defendant corporation. It was held in Wilton v. Railroad Co., 107 Mass. 108, that the invitation there given by defendant's servant to the plaintiff to ride on the horse-car which he was driving was within the general scope of his employment, and, even if it was contrary to the instructions of the driver, she was not a trespasser.

In the case at bar, the plaintiff was not on a passenger train, and he was riding in the "caboose," in a place which he could not have failed to know was not intended or adapted for the use of passengers, but wholly for the accommodation of the defendant's employés engaged in managing the train. Even if, therefore, the plaintiff had an invitation from the conductor of the freight train, he could not have supposed that the conductor was acting within the general scope of his employment, or that, independently of any rules of the corporation, he had any authority to extend such an invitation. The ordinary business of conducting and managing a freight train does not involve any right to invite persons to ride upon such trains, or to accept them as passengers. In Files v. Railroad Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411, it was held that a person who attempts to get into a cab of a locomotive engine attached to a freight train on a railroad used exclusively for the transportation of freight, to ride for his own convenience by invitation of the conductor of the train, does not acquire the rights of a passenger, and cannot recover for personal injuries occasioned to him by the starting of the engine, even if he has previously ridden thereon by a similar invitation, and has seen others, including railroad employés, do so.

In that case, as in the case at bar, it was not within the apparent

[7] Part of the opinion has been omitted.

scope of the conductor's authority to invite persons to ride on his freight train; nor is it important that the injury to the plaintiff there was occasioned by the attempt to get upon the locomotive, while in the case at bar it occurred while riding in a place not intended for passengers. We have assumed that an invitation was given by the conductor, Porter, to the plaintiff, although it did not appear that any conversation occurred between them until the plaintiff was found in the caboose; and, assuming this, the plaintiff had no right to suppose any such invitation was given by authority of and bound the defendant. Moreover, under the circumstances, the language used could not be construed as amounting to more than a mere license at most.

There was an express rule of the corporation forbidding the carrying of passengers upon a freight or construction train, except under certain special circumstances, which did not exist in the case at bar. The plaintiff urges that this is to be construed as meaning passengers for hire, and that, where no fare was to be collected, this rule was not infringed. This construction of the rule is not the obvious one, but forced and unnatural, and, in our view, inadmissible. While the plaintiff, when in the employ of the corporation, had received books containing this rule, he testified that he had never read it.

The plaintiff further contends that, apart from this rule, there was a custom on the part of the defendant to carry or allow to be carried upon its freight trains persons who had before been in the employ of the railroad, and that thus he acquired the rights of a passenger as against it. There was evidence from some of the conductors of the road that they had themselves ridden, and had permitted old employés to ride on several occasions, upon the freight trains, and also that the plaintiff had so ridden, and this, notwithstanding the rule of the corporation. But, in order that the corporation should be made responsible by reason of such a custom, it was necessary to show that it was actually known to the officials who conducted its business, or that it was so general and of such long continuance that it must be fairly inferred that it was known and assented to by them. While individual acts of thus carrying old employés were shown, the evidence of the division superintendent, who was the only official called who was connected with the general management of the road, showed that no such custom was known to him; and the whole testimony failed to establish a usage so general, uniform, and long continued that it could be permitted to override a rule which was brought to the attention of each conductor by the book of instructions which was given him. * * *

TRAVELERS' INS. CO. v. AUSTIN.

(Supreme Court of Georgia, 1902. 116 Ga. 266, 42 S. E. 522, 59 L. R. A. 107, 94 Am. St. Rep. 125.)

Action by A. V. Austin against the Travelers' Insurance Company. Judgment for plaintiff, and defendant brings error.

FISH, J.[a] The plaintiff in error issued to Austin, the deceased husband of the defendant in error, an accident insurance policy, which provided for the payment of certain indemnities in the event of accidental injuries to the insured, and of $5,000 to his widow in case of his death as a result of such injuries. The policy contained a stipulation that, "if such injuries are sustained while riding as a passenger, and being actually in or upon any railway passenger car using steam, cable, or electricity as a motive power, * * * the amount to be paid shall be double the sum specified in the clause under which claim is made." Austin was paymaster and cashier of a railroad company. It was his duty to pay the salaries of the employés of the company, and to that end he made periodical trips over the line of the railroad in what was known as a "pay car." This car had originally been one of the regular sleeping cars in use on the railroad, but had been altered so as to make it serve the purpose before indicated. * * * The pay train did not run on a regular schedule, but stopped at any station or between stations, wherever it was necessary to pay out money. Austin would frequently count out money between stations, preparatory to paying it at the next stop. While on one of these trips the pay car was derailed and overturned, and a rifle hanging in a rack in the car was thrown to the floor and discharged, killing Austin. His widow demanded double indemnity under the clause of the policy before quoted. This was refused, and she brought suit for $10,000. The insurance company, in its answer, admitted liability for $5,000, and made a tender of that amount in full of all claims against it, which was refused, and the case went to trial.

There was practically no conflict in the testimony of the witnesses, the material portions of which have been substantially set out above; the only evidence introduced by the insurance company being an extract from the proof of death submitted by Mrs. Austin, to the effect that the injury which caused her husband's death was received while he was engaged in discharging his duties as cashier and paymaster of the Georgia Southern & Florida Railroad Company. At the conclusion of the evidence, counsel for the defendant made a written motion to direct a verdict in its favor on the controlling issue in the case, viz., the right of the plaintiff, under the evidence, to recover double indemnity. This motion was denied,

[a] Parts of the opinion are omitted.

and the case went to the jury, who found for the plaintiff the full amount sued for. The defendant made a motion for a new trial, which was overruled, and it excepted.

1. From the foregoing it will be seen that the single question presented for determination by this case is whether or not, under the admitted facts, Austin was, at the time of receiving the injuries which caused his death, riding as a passenger upon a railway passenger car, within the meaning of that clause of his policy of insurance, which provided that he should receive double indemnity in the event that he should be accidentally injured or killed while so riding. This question may be subdivided into two branches: First, was he a passenger? and second, was the car in which he was riding a passenger car? "A passenger, in the legal sense of the term, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare, or that which is accepted as an equivalent therefor." 5 Am. & Eng. Enc. Law (2d Ed.) 486. "One may be both a passenger and an employé of a railroad company,—an employé when passing over the road at a time when actually engaged in performing duties for the company, but a passenger while not so engaged, but riding from one place to another, even though continuing all the while, in a popular sense, in the employ of the company." Id. 516.

It is not denied that Austin was an employé of the railroad company at the time he was killed. The question is, was he also a passenger? The mere fact that he was not a part of the operating force or train crew engaged in the act of propelling the train does not, as seems to be contended by counsel for the defendant in error, invest him with that character. He was certainly "passing over the road at a time when actually engaged in performing duties for the company." His case cannot be analogized to that of an official or an attorney who travels over the road for the purpose of reaching a point where duties are to be performed for the company, and who, while so traveling, is engaged in the performance of no duty whatever. While the pay train was going from one station or point to another, the paymaster was as much on duty as is the flagman of a passenger or freight train, whose sole duty it is to keep a lookout for other trains when the train on which he is riding has stopped between stations.

In the case of Prather v. Railroad Co., 80 Ga. 427, 9 S. E. 530, 12 Am. St. Rep. 263, the deceased husband of the plaintiff was one of a gang employed on the defendant's material train to load and unload cars, and it was his duty "to do anything to insure the careful working of the train." He was killed while the train was moving from one point to another, and at a time when he had no active duty to perform. The question arose whether or not he was a coemployé of those who were actually operating the train. This question was decided in the affirmative, our present chief justice,

who delivered the opinion, using the following language, which we think is directly applicable to the case at bar: "The fact that he had no active duty to perform while riding from one point of work to another did not make him any the less an employé during those times. He could not be an employé whilst at work at one mile post, and, having finished there, get on the car to go to the next mile post, and while riding the mile become a passenger, and at the end of the mile become an employé again." If the reasoning there employed be correct, the case cited settles beyond all question that Austin was not, in legal contemplation, a passenger; and hence that his widow is not entitled to recover the double indemnity for which she sues. This view is not in conflict with any of the cases cited in the brief of counsel for the defendant in error.

A case upon which special stress seems to be laid is that of Berliner v. Insurance Co., 121 Cal. 458, 53 Pac. 922, 41 L. R. A. 467, 66 Am. St. Rep. 49, where the supreme court of California held that the plaintiff was entitled to recover double indemnity under a clause in a policy of accident insurance almost identical with the one now under consideration, although the insured, at the time of the accident, by invitation of an officer of the railroad company, was riding upon the engine of the train on which he was traveling; it being ruled that the fact of his riding upon the engine did not deprive him of his character of passenger. That case, however, cannot properly be compared to the one now under consideration, because the relationship of the insured to the railroad company in the two cases was widely different. Berliner, so far as appears from the published report, was not employed by or connected with the railroad. Apparently he had paid his fare before beginning his journey. The court in that case takes special occasion to say, on page 465, 121 Cal., and page 921, 53 Pac. (41 L. R. A. 467, 66 Am. St. Rep. 49), that, if he had been riding on the train as an employé of the railroad company, the insurance company would not be liable under the clause providing for double indemnity. In the case of Jones v. Railway Co., 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. Rep. 514, it was held that the porter of a Pullman sleeping car occupied the position of a passenger of the railroad company in respect to the careful running and management of the train; but in that case the porter was not employed by the railroad company, as was the paymaster in this case. On the other hand, in the well-considered case of McQueen v. Railway Co., 30 Kan. 689, 1 Pac. 139, it was held that a plaintiff in the employment of a railroad company, painting depots, bridges, tanks, and switches along the line of the road, and who was transported over the road, to discharge the duties of his employment, in a small steam car used only by officers and employés of the railroad company, was not a passenger within the true sense of that term, nor entitled to the rights of a passenger.

That case is in principle directly parallel with the case now before us, and, while not binding on us, its reasoning is satisfactory to us as authority for the position that we take. To the same effect, see Railway Co. v. Salmon, 11 Kan. 83. The reason for making a distinction in the contract of insurance between passengers riding as such and employés of a railroad company in the discharge of their duties is not far to seek. The law throws greater protection around passengers than employés, and requires of railroad companies greater diligence in providing for their safety. Consequently the risk of insuring a passenger is not so great as that of insuring an employé. With this in view, the true test to be applied to determine whether one injured in a railroad accident can recover from an insurance company double indemnity is to inquire whether, presuming that a right of action exists against the railroad company, the plaintiff would be entitled to sue that company in the capacity of a passenger or an employé. In Austin's Case to ask that question is to answer it, for it is clear that the railroad company owed him no other duty than that of employer to employé, and, if liable to his widow, is only so on the ground of that relationship. * * *

THE COMMENCEMENT AND TERMINATION OF THE RELATION

I. The Commencement of the Relation[1]

WEBSTER v. FITCHBURG R. CO.

(Supreme Judicial Court of Massachusetts, 1894. 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521.)

Action by Elizabeth S. Webster, administratrix of the estate of William Webster, against the Fitchburg Railroad Company, for damages for the death of intestate by defendant's negligence. Verdict directed for defendant, and plaintiff excepts.

KNOWLTON, J. At the trial the plaintiff relied solely on her count under Pub. St. c. 73, § 6, in which she alleged that her intestate was a passenger on the defendant's railroad, and the only question in the case is whether there was evidence to warrant the jury in finding that he was a passenger. He had in his pocket a 10-trip ticket, which entitled him to ride over the defendant's railroad between Boston and the station in Somerville where the accident happened; and, immediately before he was struck and killed, he was running very rapidly, from the direction of the public street, across the defendant's premises, outside of the passenger station, to a track on which was an incoming train, apparently with a view to take another train, which was about to start for Boston, on the track beyond. It is contended in behalf of the plaintiff that, inasmuch as he had previously obtained a ticket, and was on the defendant's premises, in a place designed for the use of passengers, outside of the station, and was about to take a train, he had become a passenger.

One becomes a passenger on a railroad when he puts himself into the care of the railroad company, to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until

[1] For discussion of principles, see Doble, Bailm. & Carr. § 167.

the trip is begun, and then to be carried over the railroad. A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place, to be carried. It invites everybody to come who is willing to be governed by its rules and regulations.

In a case like this the question is whether the person has presented himself, in readiness to be carried, under such circumstances, in reference to time, place, manner, and condition, that the railroad company must be deemed to have accepted him as a passenger. Was his conduct such as to bring him within the invitation of the railroad company? In Dodge v. Steamship Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541, it was said that "when one has made a contract for passage upon the vehicle of a common carrier, and has presented himself, at a proper place, to be transported, his right to care and protection begins." In this statement it was assumed that he would be in a proper condition, and present himself in a proper manner. If his condition should render him unfit to be in the presence of passengers on the train, or if he should present himself while doing something which would expose himself or others to great danger from the cars or engines of the carrier, he would not be within the invitation of the railroad company, and it would not be expected to accept him as a passenger.

In the present case, after the arrival of the plaintiff's intestate on the defendant's premises, there was no time when he presented himself in a proper manner to be carried. He was all the time running rapidly, without precautions for his safety, towards a point directly in front of an incoming train. He did not put himself in readiness to be taken as a passenger, and present himself in a proper way. If we treat his approach as a request for passage, and if we conceive of the railroad company as being present, and speaking by a representative who saw him, there was no instant when the answer to his request would not have been: "We will not accept you as a passenger while you are exposing yourself to such peril. We do not invite persons to become passengers while they are rushing into danger in such a way." The law will not imply a contract by a railroad company to assume responsibilities for one as a passenger from such facts as appear in this case. Dodge v. Steamship Co., ubi supra; Merrill v. Railroad Co., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705; Com. v. Boston & M. R. Co., 129 Mass. 500, 37 Am. Rep. 382; Warren v. Railroad Co., 8 Allen (Mass.) 227, 85 Am. Dec. 700; Baltimore Traction Co. v. State, 97 Md. 409, 28 Atl. 397.

Exceptions overruled.

NORFOLK & W. R. CO. v. GALLIHER.

(Supreme Court of Appeals of Virginia, 1893. 89 Va. 639, 16 S. E. 935.)

Action by C. G. Galliher against the Norfolk & Western Railroad Company. Judgment for plaintiff. Defendant brings error.

FAUNTLEROY, J.[2] * * * From the testimony of the defendant in error it appears that the plaintiff, C. G. Galliher, 70 years of age, who resided near Abingdon, in Washington county, Va., was in Bristol on the 16th day of December, 1890; and a few moments before the midday departure of the train of the Norfolk & Western Railroad for Bristol, he went to the passenger station of the said company at Bristol, and applied at the window of the ticket office for a ticket to Abingdon, near his home. To this application he received the reply, "We are out of tickets;" to which he said, "What is the cause of that, baby?" The ticket agent threatened to have him arrested, and refused to sell him a ticket (on the ground, as the agent testifies, that he was drunk, but the testimony of the said Galliher is that he was not drunk, and the jury believed his statement) instantly, whereupon one John Sharratt, who was employed by the defendant company as a night watchman or policeman, rudely seized him, and wheeled him around violently, and pulled him down off the platform and across a bridge, and forced him through the streets of Bristol and the snow, 12 inches deep, and roughly forced him into a filthy and stinking calaboose. * * *

The declaration was demurred to on the ground that the declaration does not allege that the plaintiff was entitled to become a passenger. This was properly overruled by the court. It is the existing privilege and lawful right of every citizen prima facie to become a passenger, and the actual purchase of a ticket nor the entry into the car is not essential to create the relation of carrier and passenger. The declaration alleges that the plaintiff presented himself at the window of the ticket office at the schedule time of the train departure of the defendant company, and in good faith asked to buy and pay for a ticket to Abingdon, his home, and he was entitled to the courtesy and protection due to a passenger from the moment he entered upon the premises of the defendant company. A common carrier cannot assault and imprison a person offering to buy a ticket, and then claim immunity for the outrage because their agents or employés refused to sell him a ticket, or prevented him from obtaining one. Patt. Ry. Acc. Law, § 219, and note on page 214; Bryan v. Railway Co., 63 Iowa, 464, 19 N. W. 295; Railroad Co. v. Kentle, 16 Amer. & Eng. R. Cas. 337, and cases cited.

[2] Parts of the opinion are omitted.

The instructions given by the court correctly expound the law as applicable to the facts, and the verdict of the jury is plainly right upon the evidence certified. The damages given by the jury for the indignities, injuries, and suffering inflicted upon the aged plaintiff by the agents and employés of the defendant company are moderate and mild, and the judgment of this court is to affirm the judgment of the trial court under review. Affirmed.

Defendant's exceptions overruled.

DUCHEMIN v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, 1904. 186 Mass. 353, 71 N. E. 780, 66 L. R. A. 980, 104 Am. St. Rep. 580, 1 Ann. Cas. 603.)

Action by one Duchemin against the Boston Elevated Railway Company. Verdict for plaintiff. Defendant brings exceptions.

BARKER, J.[3] The action is for a personal injury occasioned by the fall of a trolley pole and car sign. The case stated in the declaration is that, as the car approached the plaintiff, he went toward it for the purpose of entering it, having given the motorman in control notice of his intention so to become a passenger, and that as he was about to get on the car the trolley pole fell, striking a sign upon the car, and the pole and sign struck the plaintiff; he being in the exercise of due care, and the defendant negligent. * * *

This leaves as the turning point of the case the question whether a foot traveler on the highway, who is approaching a street car stopped to receive him as a passenger, and before he actually has reached the car, is entitled to the rights of a passenger in respect of that extraordinary degree of care due to passengers from common carriers of passengers, at least so far as any defect in that car is concerned. In other words, the question is whether the jury should have been instructed that the defendant owed to the plaintiff the same high degree of care while he was approaching the car, and had not yet reached it, that it would owe to a passenger. It is apparent that a person in such a situation is not in fact a passenger. He has not entered upon the premises of the carrier, as has a person who has gone upon the grounds of a steam railroad for the purpose of taking a train. He is upon a public highway, where he has a clear right to be independently of his intention to become a passenger. He has as yet done nothing which enables the carrier to demand of him a fare, or in any way to control his actions. He is at liberty to advance or recede. He may change his mind, and not become a passenger. Certainly the carrier owes him no other duty to keep the pavement smooth, or the street

[3] Part of the opinion is omitted.

clear of obstructions to his progress, than it owes to all other travelers on the highway. It is under no obligations to see that he is not assaulted, or run into by vehicles or travelers, or not insulted or otherwise mistreated by other persons present. Nor do we think that as to such a person, who has not yet reached the car, there is any other duty, as to the car itself, than that which the carrier owes to all persons lawfully upon the street.

There is no sound distinction as to the diligence due from the carrier between the case of a person who has just dismounted from a street car and that of one who is about to take the car, but has not yet reached it. In the case of each the only logical test to determine the degree of care which the person is entitled to have exercised by the street railway company is whether the person actually is a passenger, or is a mere traveler on the highway. We think that a present intention of becoming a passenger as soon as he can reach the car neither makes the person who is approaching the car with that intention a passenger, nor changes as to him the degree of care to be exercised in respect of its cars as vehicles to be used upon a public way with due regard to the use of the same way by others. The defendant incurs no responsibility to exercise extraordinary diligence by making an express contract, but only by its exercise of the calling of a common carrier; and its obligation as such does not arise until the intending passenger is within its control. We are unwilling to go farther than the doctrine stated in Davey v. Greenfield Street Railway Co., 177 Mass. 106, 58 N. E. 172, that, when there has been an invitation on the part of the carrier by stopping for the reception of a passenger, any person actually taking hold of the car and beginning to enter it is a passenger. See Gordon v. West End Street Railway Co., 175 Mass. 181, 183, 55 N. E. 990, and cases cited.

If the instructions allowed the jury to find for the plaintiff only in case the car had reached a usual stopping place, and had stopped to receive him, there was error in ruling that under those circumstances, and before he had actually reached the car, he had a right to have the defendant exercise as to him that extraordinary degree of care due to passengers. So long as he remained a mere traveler on the highway, although walking upon it for the sole purpose of taking the car, the defendant did not owe him any other duty than that which it owed to any person on the highway. Whether one just has dismounted from a street car, or just is about to board one, he does not have the rights of a passenger.

Exceptions sustained.

II. Alighting at the Passenger's Destination[4]

BRUNSWICK & W. R. CO. v. MOORE.

(Supreme Court of Georgia, 1897. 101 Ga. 684, 28 S. E. 1000.)

ATKINSON, J.[5] The questions made in this case arose upon the following state of facts: Aaron Moore, as next friend of his son William, sued the railroad company, and obtained a verdict for $3,000. Defendant made a motion for a new trial, which being overruled, it excepted. The material testimony introduced upon the trial may be stated as follows: William Moore testified that he was 17 years of age; that he and eight other boys entered defendant's train at Alapaha, and traveled thereon as passengers to Willacoochee, a distance of 11 miles, on the night of February 9, 1896. The train stopped at Willacoochee not more than four or five seconds, just long enough for Moore to leave it. He had just reached the ground, and taken two steps, when a shot from a pistol, fired by the conductor of the train, struck him in the leg. * * *

It will be seen from an examination of the evidence that the plaintiff was accepted by the defendant as a passenger, and as such he traveled from the initial point of his journey to the point of destination he had in contemplation at the time he entered the company's cars. If he were a passenger at the time the injuries were inflicted upon him for which he brings this action, he was entitled to recover, for he is entitled, by virtue of his contract of passenger carriage, not only to be protected against the consequences of the negligent acts of the company's agents, resulting from the omission to perform its duties towards the passenger, but he is likewise entitled to be protected against the wanton and willful acts of violence wrongfully committed upon his person by the servants of the company during the continuance of the relation instituted by his contract with the company. Whether or not he was a passenger at the time the injuries were inflicted upon him depends upon whether, at that time, it had completed its contract of carriage with him, and, in the legal sense, delivered him at the point of destination. There was no voluntary abandonment by this passenger of his right safely to be delivered at the point of destination in accordance with the contract under which he entered the company's cars. Its servants did not, for any improper conduct upon his part, seek to expel him from the car, and thus

[4] For discussion of principles, see Doble, Bailm. & Carr. § 169.

[5] Part of the opinion is omitted.

terminate the relation of carrier and passenger; so that the relation of carrier and passenger, having commenced, continued until the carrier had fully performed its contract of carriage. It does not satisfy the requirements of this contract that the passenger should have been safely transported to the point at which he was expected to, and did, leave the car of the company. Until he had actually left, or had had a reasonable time within which to leave, the premises of the company at the point of destination, he was still a passenger, and entitled, as against the company, to all the rights and immunities of a passenger.

This was the rule laid down by the court in its instruction to the jury. It was the correct rule, and consequently this instruction afforded no ground for the granting of a new trial. 2 Am. & Eng. Enc. Law, p. 745, and cases there cited; 4 Elliott, R. R. § 1592. Whether or not the plaintiff's version of this transaction was true was a question of fact for the jury. They believed it, returned a verdict in his favor, and the trial judge has approved their finding. It is amply supported by the evidence. In view of the circumstances under which the injury occurred, the nature of the wounds inflicted, it was not excessive, and this court will not control the discretion of the trial judge in refusing to grant a new trial.

Judgment affirmed. All the justices concurring.

III. Causes Justifying the Ejection of the Passenger[6]

GULF, C. & S. F. RY. CO. v. MOODY.

(Court of Civil Appeals of Texas, 1893. 3 Tex. Civ. App. 622, 22 S. W. 1009.)

Suit by Frank Moody against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff. Defendant appeals.

STOREY, Special Judge.[7] * * * In brief, the facts show that the appellee was occupying two seats—room enough for four passengers—against the reasonable rule of the railway company to confine him to only one seat; and to prevent the removal of his baggage from the seat, he drew his pistol, and rudely displayed it in the car in the presence of other passengers, ladies and gentlemen. The conductor, not being able to enforce the rules without a breach of the peace, backed the train to the depot at Temple, secured the services of a

[6] For discussion of principles, see Doble, Bailm. & Carr. § 171.

[7] Parts of the opinion are omitted.

deputy city marshal, and had appellee arrested and taken from the train. The train then proceeded to Houston. Appellee was taken by the deputy marshal to and placed in jail for from a half to one hour. The city marshal made an affidavit against him for rudely displaying his pistol in a public place—in the car outside of the city limits—and took him before the justice of the peace, who fixed his bond for his appearance the next day for trial at $100. The city marshal deposited his money by his consent with a banker, who went his security on the bond, and he was released. The next day he was tried by a jury, and fined $1 and cost, amounting in all to $18.75, which he promptly paid, and then brought this suit for damages. * * *

The two special charges assigned as error gave undue prominence and emphasis to plaintiff's theory of his case, and in fact went much further than the already liberal charge given by the court for the plaintiff. These charges contradict the main charge of the court, and instructed the jury, in substance, that, notwithstanding the plaintiff was violating the rules of the company by occupying more than one seat, when other passengers were not thereby interfered with, he had a right to violate the rules, and that any attempt on the part of the conductor to enforce the rules would justify him (plaintiff) in resisting the conductor in his attempt to enforce the rule, and that his expulsion from the car under such circumstances, notwithstanding he maintained his alleged right to violate the rules by rudely displaying his pistol in the car in the presence of the other passengers, some of whom were ladies sitting in front of him, was wrong, the rule confining passengers to one seat is admitted, and, if a passenger persists in violating any reasonable rule of the company, it is the right and duty of the conductor to enforce the rule, and, if necessary, to eject the passenger from the train, using, of course, only such force as is necessary to enforce the rule or eject the passenger. It may be that his ejection from the cars by a peace officer was perfected with less serious consequences than if it had been attempted by the conductor. We believe the giving of these special charges asked for by the appellee requires a reversal of the judgment. * * *

VINTON v. MIDDLESEX R. CO.

(Supreme Judicial Court of Massachusetts, 1865. 11 Allen, 304, 87 Am. Dec. 714.)

Tort against a street railway corporation to recover damages for the act of one of their conductors in expelling the plaintiff from a car in which he was a passenger.

At the trial in the superior court, before Morton, J., it appeared that the plaintiff was a passenger in one of the defendants' cars, and was expelled by the conductor. There was no evidence that any rule

or regulation had ever been adopted by the defendants, authorizing their conductors to expel passengers for any cause. The defendants introduced evidence tending to show that at the time of the expulsion the plaintiff was intoxicated, and used loud, boisterous, profane and indecent language towards the conductor and attempted to strike him, and that he was therefore expelled. But the evidence on this point was conflicting. There were four women in the car as passengers.

The defendants requested the court to instruct the jury, amongst other things, as follows: "If the jury find that the plaintiff was in the defendants' car in a state of intoxication, so as reasonably to induce the conductor to believe that the plaintiff would be an annoyance to the passengers, or if the plaintiff so conducted, or used boisterous, profane or indecent language, naturally calculated to annoy the passengers, and persisted in so doing after being requested to be quiet, the conductor would be justified in removing him, using no more violence than was necessary to effect his removal."

The judge declined so to rule, and instructed the jury as follows: "If the plaintiff, by reason of intoxication or otherwise, was, in act or language, offensive or annoying to the passengers, the conductor had a right to remove him, using reasonable force. If the conductor, in the performance of his service as conductor, forcibly removed the plaintiff without justifiable cause, or if, having justifiable cause, he used unnecessary and unreasonable violence, in kind or degree, in removing him, the defendants are liable."

The jury returned a verdict for the plaintiff, with $1,000 damages; and the defendants alleged exceptions.

BIGELOW, C. J. By the instructions under which this case was submitted to the jury, in connection with the refusal of those which were asked for by the defendants, we are led to infer that the learned judge who presided at the trial was of opinion that the defendants and their duly authorized agents had no legal power or authority to exclude or expel from the vehicles under their charge a passenger whose condition and conduct were such as to give a reasonable ground of belief that his presence and continuance in the vehicle would create inconvenience and disturbance and cause discomfort and annoyance to other passengers. Such certainly were the result and effect of the rule of law laid down for the guidance of the jury at the trial. We are constrained to say that we know of no warrant, either in principle or authority, for putting any such limitation on the right and authority of the defendants as common carriers of passengers, or of their servants acting within the scope of their employment.

It being conceded, as it must be under adjudicated cases, that the defendants, as incident to the business which they carried on, not only had the power but were bound to take all reasonable and proper means to insure the safety and provide for the comfort and convenience of passengers, it follows that they had a right, in the exercise

of this authority and duty, to repress and prohibit all disorderly conduct in their vehicles, and to expel or exclude therefrom any person whose conduct or condition was such as to render acts of impropriety, rudeness, indecency or disturbance either inevitable or probable. Certainly the conductor in charge of the vehicle was not bound to wait until some overt act or violence, profaneness or other misconduct had been committed, to the inconvenience or annoyance of other passengers, before exercising his authority to exclude or expel the offender. The right and power of the defendants and their servants to prevent the occurrence of improper and disorderly conduct in a public vehicle is quite as essential and important as the authority to stop a disturbance or repress acts of violence or breaches of decorum after they have been committed, and the mischief of annoyance and disturbance have been done.

Indeed, if the rule laid down at the trial be correct, then it would follow that passengers in public vehicles must be subjected to a certain amount or degree of discomfort or insult from evil disposed persons before the right to expel them would accrue to a carrier or his servant. There would be no authority to restrain or prevent profaneness, indecency or other breaches of decorum in speech or behavior, until it had continued long enough to become manifest to the eyes or ears of other passengers. It is obvious that any such restriction on the operation of the rule of law would greatly diminish its practical value. Nor can we see that there is any good reason for giving so narrow a scope to the authority of carriers of passengers and their agents as was indicated in the rulings at the trial. The only objection suggested is, that it is liable to abuse and may become the instrument of oppression. But the same is true of many other salutary rules of law. The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers, if he was admitted into a public vehicle or allowed longer to remain within it.

Exceptions sustained.

Judgment for plaintiff Reversed.

BROWN v. CHICAGO, R. I. & P. R. CO.

(Supreme Court of Iowa, 1879. 51 Iowa, 235, 1 N. W. 487.)

This is an action to recover injuries which the plaintiff alleges he sustained by being forcibly ejected from the defendant's passenger train, at a point about one mile distant from a station. There was a jury trial, and a verdict and judgment for plaintiff, for one thousand dollars. The defendant appeals.

DAY, J.[8] * * * 3. The defendant asked the court to give the jury the following instruction, with the exception of the italicized portions: "Railroad companies have the right to demand and receive legal rates of fare from persons traveling on their trains, and in the event of the refusal of a passenger to pay his fare or show a ticket, conductors of a train have a right to eject such a passenger from the train without using any more force or violence than may be necessary to overcome any unlawful resistance which such passenger may offer. It is the duty of the conductor to bring the train to a full stop before compelling the party to be ejected to step from the train, *and exercise such ordinary care in ejecting him as an ordinarily prudent man would exercise under similar circumstances as connected with this case.* In this case it is not necessary that the train should be at a station in order to justify the ejection of a person refusing to pay fare; but a conductor has a right to eject such a person between stations at points *not remote from stations,* and where the situation of the ground is such as not to expose the person ejected to special risks of danger." The court modified this instruction by inserting the parts indicated in italics, and gave it as modified. The refusal of the court to give the instruction as asked, and the modification of it, the defendant assigns as error.

Complaint is made only of the last modification, by the insertion of the words, *not remote from stations.* Where there is no statute requiring the ejection of a person refusing to pay his fare at a station, the right to eject is not, we think, limited to points not remote from stations. A train running at an ordinary rate would often be much more remote from a station than the point where plaintiff was ejected before the conductor could pass through the train and ascertain that there was a person aboard who refused to pay fare. If the passenger cannot be evicted at such point, he must be carried free to the next station, or the train must be backed to a point near to the station, thus subjecting all the other passengers to a liability to lose connection, or to danger from accident on account of increased speed to make up for loss of time. The mere fact of remoteness from the station, we think, is not material. In exercising the right of ejection, reasonable and ordinary care should be employed. In determining whether such care has been exercised, all the circumstances should be considered, as the physical condition of the person ejected; the time, whether in daylight or late at night; the condition of the country, whether thickly or sparsely settled; the place of the ejection, whether near to or remote from dwellings of any character, including stations; the character of the weather, whether pleasant or inclement, etc., etc. The rules of law, as well as the dictates of humanity, require that the ejection shall occur at such place, and be conducted in such manner, as not unreasonably to expose the party to danger. But, as a rule of

[8] Parts of the opinion have been omitted.

law, we do not think a railroad company can be held liable simply for ejecting a recusant passenger at a point remote from a station, if, in other respects, he is not subjected to unreasonable danger. Jeffersonville Ry. Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276.

For the error in the modification of this instruction, the judgment is reversed.

IV. Circumstances Surrounding the Ejection of the Passenger [9]

CHICAGO, ST. L. & P. R. CO. v. BILLS.

(Supreme Court of Indiana, 1885. 104 Ind. 13, 3 N. E. 611.)

ELLIOTT, J.[10] * * * The appellee's counsel contest the assumption of appellant, and affirm that the theory upon which the complaint proceeds is that the conductor used unnecessary force in ejecting the appellee from the train. We have no doubt that the law is that if the conductor uses unnecessary force in ejecting a passenger, the company is liable, although the conductor may have a right to eject him and to employ reasonable force to expel him from the train. McClure v. Philadelphia, etc., R. Co., 34 Md. 532, 6 Am. Rep. 345; Shedd v. Boston, etc., R. Co., 40 Vt. 88. This is but the application of an old principle, old as the law itself, to a modern instance; for it has ever been the law that no man has a right to employ unnecessary force in doing any act. While it is true that a conductor may not use unnecessary force to eject a passenger, it is also true that he may employ reasonable force to accomplish that object. The degree of force is determined, not by results simply, for other facts must be taken into consideration, and chief among such facts is the resistance made by the passenger. It is obvious that a passenger who makes no resistance cannot lawfully be treated like one who does resist the commands and efforts of the conductor. Resistance may make great force necessary and reasonable, while acquiescence in the directions of the conductor may render any degree of force unnecessary and unreasonable. If words will accomplish the object, force should not be employed.

The use of unnecessary force is unlawful. He who constructs a complaint upon the theory that unnecessary force was used in expelling a passenger from a railroad train proceeds upon the ground that an unlawful act was committed. One who bases his cause of action upon the performance of an unlawful act must affirmatively

[9] For discussion of principles, see Dobie, Bailm. & Carr. § 172.

[10] Parts of the opinion have been omitted.

show it to be unlawful. The appellee does not base his cause of action upon the performance of an unlawful act, and it therefore devolves upon him to show that it was unlawful. Acts cannot be shown to be unlawful by epithets; facts alone can have this effect. The result of these principles is that this complaint cannot be good upon the theory assumed by the appellee, unless it states such facts as show that the act of the appellant's conductor was unlawful. In order to show that the act was unlawful, it is essential to state facts showing that unnecessary force was employed in ejecting the appellee from the train. In our opinion no such facts are stated. These are the averments of the complaint upon this point: "That the conductor stopped the train and put the plaintiff off the train beside the road about one mile from Elwood. And the plaintiff further alleges that he is so afflicted with a disease called hernia that he is compelled to wear a truss, and that, in putting him off the train, the conductor used so much force and violence that he broke his truss and rendered it entirely useless, and the conductor also threw him violently to the ground and greatly bruised and wounded him."

These allegations do show that force was used, but they are far from showing that it was unnecessary. For anything that appears, the conductor may have used the least possible degree of force necessary to expel the appellee from the train. It may be that the resistance of the appellee made necessary all the force that the conductor used. We cannot presume that the conductor did an unlawful thing; on the contrary, the presumption is that his act was lawful. A plaintiff cannot make a cause of action upon an unlawful act without averring facts showing it to be unlawful, for the presumption is against him. We could not hold the complaint good even if we agreed with appellee's counsel in their view of the theory upon which it proceeds. * * *

April 11th, 1924

THE LIABILITIES OF THE COMMON CARRIER OF PASSENGERS

I. The Duty to Accept and Carry Passengers

Judgement for Plaintiff

BENNETT v. DUTTON.

(Supreme Court of Judicature of New Hampshire, 1839. 10 N. H. 481.)

PARKER, C. J.[2] It is well settled that so long as a common carrier has convenient room, he is bound to receive and carry all goods which are offered for transportation, of the sort he is accustomed to carry, if they are brought at a reasonable time, and in a suitable condition. Story on Bailments, 328; 5 Bing. R. 217; Riley v. Horne, 15 Eng. C. L. R. 426. * * *

And we are of opinion that the proprietors of a stagecoach, for the regular transportation of passengers, for hire, from place to place, are, as in the case of common carriers of goods, bound to take all passengers who come, so long as they have convenient accommodation for their safe carriage, unless there is a sufficient excuse for a refusal. Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Hollister v. Nowlen, 19 Wend. (N. Y.) 239; 32 Am. Dec. 455.

The principle which requires common carriers of goods to take all that are offered, under the limitations before suggested, seems well to apply.

Like innkeepers, carriers of passengers are not bound to receive all comers. Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209. The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion. And his object at the time may furnish a sufficient excuse for a refusal; as, if it be to commit an assault upon another passenger, or to injure the business of the proprietors.

The case shows the defendant to have been a general carrier of passengers, for hire, in his stagecoach, from Nashua to Amherst, at the time of the plaintiff's application. It is admitted there was room in the coach; and there is no evidence that he was an improper person to be admitted, or that he came within any of the reasons of exclusion before suggested.

It has been contended that the defendant was only a special carrier of passengers, and did not hold himself out as a carrier of persons generally; but the facts do not seem to show a holding out for special employment. He was one of the proprietors, and the driver,

[1] For discussion of principles, see Dobie, Bailm. & Carr. § 175.

[2] The statement of facts and part of the opinion are omitted.

of a line of stages from Nashua to Amherst and Francestown. They held themselves out as general passenger carriers between those places. But, by reason of their connection with French's line of stages from Lowell to Nashua, they attempted to make an exception of persons who came from Lowell to Nashua, in Tuttle's stage, on the same day in which they applied for a passage for the north. It is an attempt to limit their responsibility in a particular case, or class of cases, on account of their agreement with French.

It is further contended that the defendant and other proprietors had a right to make rules for the regulation of their business, and among them a rule that passengers from Lowell to Amherst and onward should take French's stage at Lowell, and that by a notice brought home to the individual the general responsibility of the defendant, if it existed, is limited.

But we are of opinion that the proprietors had no right to limit their general responsibility in this manner.

It has been decided, in New York, that stagecoach proprietors are answerable, as common carriers, for the baggage of passengers; that they cannot restrict their common-law liability by a general notice that the baggage of passengers is at the risk of the owners; and that if a carrier can restrict his common-law liability it can only be by an express contract. Hollister v. Nowlen, 19 Wend. (N. Y.) 239, 32 Am. Dec. 455. And this principle was applied, and the proprietors held liable for the loss of a trunk, in a case where the passenger stopped at a place where the stages were not changed, and he permitted the stage to proceed, without any inquiry for his baggage. Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470. However this may be, as there was room in the defendant's coach, he could not have objected to take a passenger from Nashua, who applied there, merely because he belonged to some other town. That would furnish no sufficient reason, and no rule or notice to that effect could limit his duty. And there is as little legal reason to justify a refusal to take a passenger from Nashua, merely because he came to that place in a particular conveyance.

The defendant might well have desired that passengers at Lowell should take French's line, because it connected with his. But if he had himself been the proprietor of the stages from Lowell to Nashua, he could have had no right to refuse to take a passenger from Nashua, merely because he did not see fit to come to that place in his stage. It was not for him to inquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business; nor was the plaintiff to be punished, because he had come to Nashua in a particular manner.

The defendant had good right, by an agreement with French, to give a preference to the passengers who came in French's stage; and as they were carriers of the mail on the same route, it seems he was bound

so to do without an agreement. If, after they were accommodated, there was still room, he was bound to carry the plaintiff, without inquiring in what line he came to Nashua.

Judgment for the plaintiff.

Judgment for plaintiff.

II. Liability for Delay in Transporting the Passenger [3]

SEARS v. EASTERN R. CO.

(Supreme Judicial Court of Massachusetts, 1867. 14 Allen, 433, 92 Am. Dec. 780.)

CHAPMAN, J.[4] If this action can be maintained, it must be for the breach of the contract which the defendants made with the plaintiff. He had purchased a package of tickets entitling him to a passage in their cars for each ticket from Boston to Lynn. This constituted a contract between the parties: Cheney v. Boston & Fall River R. R., 11 Metc. (Mass.) 121, 45 Am. Dec. 190; Boston & Lowell R. R. v. Proctor, 1 Allen (Mass.) 267, 79 Am. Dec. 729; Najac v. Boston & Lowell R. R., 7 Allen (Mass.) 329, 83 Am. Dec. 686. The principal question in this case is, What are the terms of the contract? The ticket does not express all of them. A public advertisement of the times when their trains run enters into the contract, and forms a part of it: Denton v. Great Northern R'y, 5 El. & B. 860. It is an offer which, when once publicly made, becomes binding if accepted before it is retracted: Boston & Maine R. R. v. Bartlett, 3 Cush. (Mass.) 227. Advertisements offering rewards are illustrations of this method of making contracts. But it would be unreasonable to hold that advertisements as to the time of running trains, when once made, are irrevocable. Railroad corporations find it necessary to vary the time of running their trains, and they have a right, under reasonable limitations, to make this variation, even as against those who have purchased tickets. This reserved right enters into the contract, and forms a part of it. The defendants had such a right in this case.

But if the time is varied, and the train fails to go at the appointed time, for the mere convenience of the company or a portion of their expected passengers, a person who presents himself at the advertised hour and demands a passage is not bound by the change unless he has had reasonable notice of it. The defendants acted upon this view of their duty, and gave certain notices. Their trains had been advertised

[3] For discussion of principles, see Dobie, Bailm. & Carr. § 177.

[4] The statement of facts is omitted.

to go from Boston to Lynn at 9:30 p. m., and the plaintiff presented himself, with his ticket, at the station to take the train; but was there informed that it was postponed to 11:15. The postponement had been made for the accommodation of passengers who desired to remain in Boston to attend places of amusement. Certain notices of the change had been given; but none of them had reached the plaintiff. They were printed handbills posted up in the cars and stations on the day of the change, and also a day or two before. Though he rode in one of the morning cars from Lynn to Boston, he did not see the notice, and no legal presumption of notice to him arises from the fact of its being posted up. Brown v. Eastern Railroad, 11 Cush. (Mass.) 101; Malone v. Boston & Worcester Railroad, 12 Gray (Mass.) 388, 74 Am. Dec. 598. The defendants published daily advertisements of their regular trains in the "Boston Daily Advertiser," "Post," and "Courier," and the plaintiff had obtained his information as to the time of running from one of these papers. If they had published a notice of the change in these papers, we think he would have been bound by it. For as they had a right to make changes, he would be bound to take reasonable pains to inform himself whether or not a change was made. So if in their advertisement they had reserved the right to make occasional changes in the time of running a particular train, he would have been bound by the reservation. It would have bound all passengers who obtained their knowledge of the time-tables from either of these sources. But it would be contrary to the elementary law of contracts to hold that persons who relied upon the advertisements in either of those papers should be bound by a reservation of the offer, which was, without their knowledge, posted up in the cars and stations. If the defendants wished to free themselves from their obligations to the whole public to run a train as advertised they should publish notice of the change as extensively as they published notice of the regular trains. And as to the plaintiff, he was not bound by a notice published in the cars and stations which he did not see. If it had been published in the newspapers above mentioned, where his information had in fact been obtained, and he had neglected to look for it, the fault would have been his own.

The evidence as to the former usage of the defendants to make occasional changes was immaterial, because the advertisement was an express stipulation which superseded all customs that were inconsistent with it. An express contract cannot be controlled or varied by usage. Ware v. Hayward Rubber Co., 3 Allen (Mass.) 84.

The court are of opinion that the defendants, by failing to give such notice of the change made by them in the time of running their train on the evening referred to as the plaintiff was entitled to receive, violated their contract with him, and are liable in this action. Judgment for the plaintiff.

III. Liability for Injuries to the Passenger

1. In General[5]

LOUISIANA & N. W. R. CO. v. CRUMPLER.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1903. 122 Fed. 425, 59 C. C. A. 51.)

THAYER, Circuit Judge.[6] This is an action which was brought by J. F. Crumpler against the Louisiana & Northwest Railroad Company to recover damages which the plaintiff below sustained in consequence of the derailment of one of the defendant company's trains on which the plaintiff was riding as a passenger. The complaint alleged, in substance, that the derailment was occasioned by reason of the fact that the defendant company failed to provide the plaintiff with a safe car wherein to ride, in that the wheels or running gear of the car were so defective, for some reason unknown to the plaintiff, that they would not properly adhere to the rails; and that the defendant company failed and neglected to exercise proper care in providing a safe track upon which the plaintiff was to be carried, in that the roadbed where the derailment occurred was unevenly graded, that the ties upon which the rails rested were placed at an unsafe distance apart, and in that they were small, rotten, and otherwise defective and unfit for use. By its answer the defendant company admitted that the plaintiff entered one of its trains to be transported as a passenger from a station called Gibsland, on its road, to another station, termed Brister, in the state of Arkansas. It admitted that the train was derailed, but denied all of the allegations of negligence that were contained in the complaint, and alleged that the derailment of the car was occasioned by unavoidable accident. The evidence in the lower court is not set out in full in the record, but it is conceded that it tended to show that the derailment of the train was caused by the bad condition of the roadbed at the place where the cars left the track; that many of the ties at that place were rotten; and that many of the spikes that fastened the rails to the ties were loose. It is likewise conceded that there was testimony to the contrary, which tended to show that the track where the derailment occurred was in a reasonably safe condition, and that the derailment might have been occasioned by reason of the fact that the trucks of one of the cars were new or stiff, being very little

[5] For discussion of principles, see Dobie, Bailm. & Carr. § 179.

[6] Parts of the opinion are omitted.

worn, and that this car first left the track as the train was moving around a curve and was approaching a trestle.

At the conclusion of the testimony the court charged the jury to the following effect: That while the duty rested upon the defendant company, as a carrier of passengers, to exercise the highest practical care to provide a safe roadbed, sound ties, and strong rails securely laid, and safe cars wherewith to transport the plaintiff, and that if it was guilty of negligence in any one or in all of these particulars the plaintiff might recover, provided the injury of which he complained was the direct result of one of such acts of negligence, yet that the duty resting upon the defendant as a carrier of passengers did not compel it to exercise all the care and diligence the human mind could conceive of, nor such care as would render the transportation of passengers free from any possible danger to them, nor such as would drive the carrier out of business; that the carrier, for instance, was not required to lay iron or granite cross-ties simply because such ties were less liable to decay, and hence safer than wood; that it was required to exercise the highest degree of practical care, diligence, and skill, but that there were some casualties which human sagacity could not guard against and foresee, and that every passenger must make up his mind to meet the risks incident to the mode of travel which he adopts, that cannot be avoided by the highest degree of care and skill in the preparation and management of the means of conveyance, and to submit to the privations and restraints and conform to the provisions which might be made and enforced for his safety and protection. It further charged the jury that when a train of cars on which a person is riding leaves the track, or is derailed, such an occurrence creates a presumption that the carrier has been in some respect negligent, and entitles the passenger to recover for such injuries as he may have sustained in consequence of the derailment, unless the presumption of negligence is overcome by proof to the contrary introduced by the carrier. After giving these general directions, the trial judge instructed the jury that the question whether the defendant company had been guilty of culpable negligence as charged by the plaintiff was a question of fact, which the jury must determine in the light of all the evidence in the case. * * *

We think that the case was submitted to the jury under instructions as to the law that were substantially correct, and that no occasion exists for granting a new trial. It is highly probable that the jury were of opinion that the defendant company had not succeeded in overcoming the presumption of negligence which was raised by the fact that while the train was moving at a usual rate of speed it left the track and rolled down an embankment.

The judgment below is accordingly affirmed.

2. MEANS OF TRANSPORTATION[7]

STEELE v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, 1899. 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756.)

JONES, J.[8] * * * 2. As to the degree of care to be exercised by the carrier to a passenger on a freight train and the risks assumed by such a passenger. The circuit court refused to charge the following requests by the defendant: "(2) In boarding a freight train, passengers assume the increased risks and diminution of comfort incident thereto, and, if the train is managed with the care usual and requisite for such trains, it is all that those who voluntarily board them have a right to expect. (3) A passenger upon a freight train is presumed to assume the risks of jolts and jars not caused by the negligence of the railroad employés; and in this case, if you find that it was such a jolt or jar which threw the plaintiff from his seat, he cannot recover in this action."

On this subject the court charged as follows: "Now, while they [carriers] are not insurers of passengers, yet the law enjoins upon them the highest degree of care in the management and conduct of their cars to insure the safety of the passenger. Now, whether he boards a freight train, mixed train, or passenger train does not make any difference, so far as the liability of the carrier is concerned. His contract is fixed when he receives the passenger's money. Whether he receives him on a freight train, passenger train, or mixed train matters not. He assumes the obligation, as soon as he takes the passenger's fare, to carry him—transport him—to his point of destination, with that degree of care which the law contemplates he should exercise; and he would not be permitted to excuse himself from care by reason of the fact that he was operating a freight train at that time. Now, the law does not compel a common carrier to convey passengers on freight trains. That is optional with them. But, if they undertake to do it, the law then fixes upon them that degree of care that attaches to common carriers of passengers; and it says, in the transportation of a passenger, the carriers must use the highest degree of skill and care in so conducting the carriage or the train of cars as to not injure the passenger."

[7] For discussion of principles, see Doble, Bailm. & Carr. § 180. Besides the cases under this heading, see Louisiana & N. W. R. Co. v. Crumpler, ante, p. 326.

[8] Parts of the opinion are omitted.

We think the general charge above should have been modified or qualified substantially in accordance with the above requests to charge. A carrier of a passenger on a freight train is bound to exercise the highest degree of care consistent with the practical and efficient use of the train for its primary purpose of transporting freight, and a passenger thereon assumes such inconvenience and risks as usually attend the operation of such train with all reasonable skill and caution as a freight train. Whatever the mode of conveyance, whether by passenger, mixed, or freight train, the carrier is liable for any negligence resulting in injury to a passenger, and in that sense the law requires the highest degree of care in all cases; but, in applying this rule, the jury should take notice of the particular mode of conveyance. For illustration, in the management of a regular passenger train the highest degree of care may require the use of a bell cord, or a brakeman on each car, or automatic brakes, but in the management of a freight train the same degree of care may not require these things. To require of freight trains all the safeguards against danger which is required of a passenger train might render the operation of freight trains impracticable in many localities.

These views are supported by the authorities. Railroad Co. v. Arnol, 144 Ill. 261, 33 N. E. 206, 19 L. R. A. 313; Olds v. Railroad Co., 172 Mass. 73, 51 N. E. 451; Dunn v. Railway, 58 Me. 187, 4 Am. Rep. 272; Wallace v. Railroad Co., 98 N. C. 494, 4 S. E. 503, 2 Am. St. Rep. 346; Crine v. Railway Co., 84 Ga. 651, 11 S. E. 557; McGee v. Railway Co., 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; Railroad Co. v. Ashley, 14 C. C. A. 373, 67 Fed. 209; Railroad Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Railroad Co. v. Bisch, 120 Ind. 549, 22 N. E. 664. * * *

Judgment for plaintiff affirmed.

HEGEMAN v. WESTERN R. CORPORATION.

(Court of Appeals of New York, 1855. 13 N. Y. 9, 64 Am. Dec. 517.)

The action was brought to recover damages for injuries to the person of the plaintiff, alleged to have been caused by the negligence of the defendant. * * * The plaintiff proved that the defendant was the proprietor of a railroad extending from Greenbush to Boston; that in September, 1850, the plaintiff was a passenger on the railroad, having taken the train at Greenbush for Boston, and when near Hinsdale, Mass., an axle of the car in which he was riding broke, and three of the passengers in the car were killed and the plaintiff was seriously and permanently injured. * * * The jury returned a verdict in favor of the plaintiff. * * * The defendant appealed to this court.

GARDINER, C. J.[9] * * * The substance of the charge was, that although the defect was latent, and could not be discovered by the most vigilant external examination, yet if it could be ascertained by a known test, applied either by the manufacturer or the defendant, the latter was responsible. In these instructions there was no error. * * *

Two questions were presented for the consideration of the jury. First, was there a test known to and used by others, and which should have been known to a skillful manufacturer, by which the concealed defect in the axle of the car could have been detected; and if so, then, secondly, was the injury to the plaintiff the consequence of that imperfection? There was evidence tending to establish these facts, which the jury have found, and the question returns: Can the defendant who neither applied the test nor caused it to be applied by the manufacturer, insist that "this accident could not have been avoided by the utmost degree of care and skill in the preparation of the means of conveyance," or "that they used all precautions, as far as human care and foresight would go, for the safety of the plaintiff as one of their passengers"? It seems to me there can be but one answer to the question.

It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron, or manufacturers of cars, in the prosecution of their business. This also must be conceded. What the law does require is, that they shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the "utmost care and skill in its preparation." They may construct it themselves, or avail themselves of the services of others; but in either case, they engage that all that well directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public, or the law, as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in the particular instance. If to this extent they are not responsible, there is no security for individuals or the public.

It is perfectly understood that latent defects may exist, undiscoverable by the most vigilant examination, when the fabric is completed, from which the most serious accidents have and may occur. It is also well known, as the evidence in this suit tended to prove, and the jury have found that a simple test (that of bending the iron after the axle was formed and before it was connected with the wheel) existed by which it could be detected. This should have been known and applied by men "professing skill in that particular business." It was not known, or if known, was

[9] Parts of the statement of facts and of the opinion are omitted.

not applied by these manufacturers. It was not used by the defendant, nor did they inquire whether it had been used by the builders. They relied upon an external examination, which they were bound to know would not, however faithfully prosecuted, guard their passengers against the danger arising from concealed defects in the iron of the axles, or in the manufacture of them. For this omission of duty, or want of skill, the learned judge held, and I think correctly, that they were liable. * * *

The judgment of the Supreme Court should be affirmed.

3. STATIONAL FACILITIES [10]

KELLEY v. MANHATTAN RY. CO.

(Court of Appeals of New York, 1889. 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74.)

PECKHAM, J.[11] The rule in relation to the liability of railroad corporations for injuries sustained by passengers under such circumstances as this case develops differs from that which obtains in the case of an injury to a passenger while he is being carried over the road of the corporation, and where the injury occurs from a defect in the road-bed, machinery, or in the construction of the cars, or where it results from a defect in any of the appliances such as would be likely to occasion great danger and loss of life to those traveling on the road. The rule in the latter case requires from the carrier of passengers the exercise of the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such a case is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance. As the result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accident. See Hegeman v. Railroad Corp., 13 N. Y. 9, 64 Am. Dec. 517. But in the approaches to the cars, such as platforms, halls, stairways, and the like, a less degree of care is required; and for the reason that the consequences of a neglect of the highest skill and care which human foresight can attain to are naturally of a much less serious nature, the rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended. We have lately had cases of this character before us, and in the case of Lafflin v. Railroad Co., 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433,

[10] For discussion of principles, see Dobie, Bailm. & Carr. § 181.

[11] The statement of facts and part of the opinion are omitted.

where a passenger was injured in stepping from a car onto the platform, because, as he alleged, the platform was too far from the steps of the car, this rule was announced, (opinion per Earl, J.:) "'The company was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient, and useful. It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it was devoted." * * *

In applying this rule of reduced liability to the case in hand, we are unable to see from the evidence on the part of the plaintiff that the defendant was guilty of such negligence as would permit the recovery of a judgment for the injury sustained by the deceased. The night was cold and stormy. Snow fell, mixed with sleet, and the sidewalks were rendered very slippery. This the deceased knew, for he walked upon them from the saloon to the Thirty-fourth Street station. The storm commenced about midnight, and continued until nearly 4 o'clock in the morning, and this accident happened between half past 5 and 6 o'clock. The defendant had furnished a covered stairway, with hand-rails, and pieces of rubber on each step to prevent slipping; and the failure to throw ashes or sawdust, or something of that character, upon the steps during the storm cannot be regarded as negligence, because the continuance of the storm would soon render the steps as slippery as before; and it seems to us that culpable negligence cannot be predicated upon the failure to clean off the steps between the time the storm ceased, which was between 3 and 4 o'clock in the morning, and the time when the accident happened. So brief a period as that, at such a time in the night, cannot, we think, be regarded as any evidence of a lack of that reasonable care which the defendant was bound to exercise. * * *

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4. Duties in Connection with Transportation [12]

CHICAGO & A. R. CO. v. ARNOL.

(Supreme Court of Illinois, 1893. 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313.)

SHOPE, J.[13] * * * The implied contract to carry safely necessarily includes the furnishing of reasonable opportunity to alight from the train safely at the end of the journey. Railroad Co. v. Aspell, 23 Pa. 147, 62 Am. Dec. 323; Imhoff v. Railroad Co., 20 Wis. 344; Railroad Co. v. Hendricks, 26 Ind. 228; Burrows v. Railway

[12] For discussion of principles, see Dobie, Bailm. & Carr. § 182.

[13] Parts of the opinion are omitted.

Co., 63 N. Y. 556; Dougherty v. Railway Co., 86 Ill. 467; Railway Co. v. Rector, 104 Ill. 296. Whether appellee was, under the circumstances shown, justified in assuming that it was the intention of those in charge of the train to discharge passengers for Shirley at the time and place of the first stop of the caboose in which she was riding, was the question of fact for the jury. If the conduct of appellant's servants, and their management of the train, amounted to an invitation to then alight, and would be so understood and acted upon by reasonable and prudent persons, and appellee, acting in good faith upon such invitation, arose, upon the train coming to a standstill, for that purpose, the jury would be justified in finding that she was in the exercise of ordinary care for her own safety. If she, by reason of such apparent invitation, was placed in peril from the further movement of the train, the duty at once arose on the part of appellant to stop its train a sufficient length of time to permit her to leave it in safety, or to warn her of the danger in time to avert injury; and it could not, in such case, be material whether the shock of the train producing the injury was an incident of the ordinary operation of the train, or was extraordinary, and unnecessarily violent. The duty of the carrier was to be measured by the peril to the passenger, whom it had accepted and undertaken to safely carry, and who had been induced by the conduct of its servants to assume a position of danger. In McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631, speaking of the duty of the receiver who was operating the railroad, we said: "Having, by the acts and conducts of his servants, justified the plaintiff in attempting to get off the train, the duty of the defendant then attached to stop his train a sufficient length of time to enable the plaintiff to reach the platform in safety,"—and held that the duty related to the place where the plaintiff had been induced, by the conduct of the servants and the stopping of the train, to believe she was to alight, and not to the final stopping of the train, after the injury, a few feet further on, at the same platform. See, also, Taber v. Railroad Co., 71 N. Y. 489; Van Horn v. Railway Co., 38 N. J. Law, 133; Railway Co. v. Farrell, 31 Ind. 408; Bridges v. Railway Co., L. R. 7 H. L. 213; Nance v. Railroad Co., 94 N. C. 619; Praeger v. Railway Co., 24 Law T. (N. S.) 105. * * *

5. Protection of the Passenger[14]

PITTSBURGH, FT. W. & C. RY. CO. v. HINDS.

(Supreme Court of Pennsylvania, 1866. 53 Pa. 512, 91 Am. Dec. 224.)

Woodward, C. J.[15] The action is for an injury sustained by the plaintiff's wife whilst she was a passenger in the cars of the defendants; and what is peculiar in the case is the fact that the injury was not occasioned by defective machinery, or cars or road or by anything that pertained properly to their business as transporters, but was caused by the fighting of passengers among themselves. Drunken and quarrelsome men intruded into the ladies' car in great numbers whilst the train stopped at Beaver Station, and in the disgraceful fight which ensued among them, the plaintiff's arm was broken, and for this the railroad company is sued. Had the suit been against the riotous men who did the mischief, the right of recovery would have been undoubted, for it is not more the duty of railroad companies to transport their passengers safely than it is the duty of passengers to behave in a quiet and orderly manner. This is a duty which passengers owe both to the company and to fellow-passengers, and when one is injured by neglect of this duty the wrong-doer should respond in damages. But in such a case is the company liable?

There is no such privity between the company and the disorderly passenger as to make them liable on the principle of respondeat superior. The only ground on which they can be charged is a violation of the contract they made with the injured party. They undertook to carry the plaintiff safely, and so negligently performed this contract that she was injured. This is the ground of her action—it can rest upon no other. The negligence of the company, or of their officers in charge of the train, is the gist of the action, and so it is laid in the declaration. And this question of negligence was submitted to the jury in a manner of which the company have no reason to complain. * * *

If the conductor did not do all he could to stop the fighting there was a negligence. Whilst a conductor is not provided with a force sufficient to resist such a raid as was made upon the train in this instance, he has, nevertheless, large powers at his disposal, and if properly used, they are generally sufficient to preserve order within the cars, and to expel disturbers of the peace. His official character and position are a power. Then he may stop the train and call to his assistance the engineer, the fireman, all the brakemen, and such pas-

[14] For discussion of principles, see Doble, Bailm. & Carr. § 184.

[15] The statement of facts and parts of the opinion are omitted.

sengers as are willing to lend a helping hand, and it must be a very formidable mob, indeed, more formidable than we have reason to believe had obtruded into these cars, that can resist such a force. Until at least he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict. To keep his train in motion and busy himself with collecting fares in forward cars whilst a general fight was raging in the rearmost car, where the lady passengers had been placed, was to fall far short of his duty. Nor did his exhortation to the passengers to throw the fighters out come up to the demands of the hour. He should have led the way, and no doubt passengers and hands would have followed his lead. He should have stopped the train, and hewed a passage through the intrusive mass until he had expelled the rioters, or have demonstrated, by an earnest experiment, that the undertaking was impossible. * * *

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6. The Contributory Negligence of the Passenger[16]

FLETCHER v. BOSTON & M. R. R. et al.

(Supreme Judicial Court of Massachusetts, 1905. 187 Mass. 463, 73 N. E. 552. 105 Am. St. Rep. 414.)

Action for personal injuries by one Fletcher against the Boston & Maine Railroad and another. Defendants had judgment, and plaintiff brings exceptions.

Braley, J.[17] * * * It appears that he properly became a passenger on a train of the defendant railroad, and took a seat in the smoking compartment of a combination car, the other part of which, and next to the locomotive, was used for baggage. He left his seat some time before reaching his destination, went into the baggage compartment, and engaged in conversation with the baggage master, who, when the train approached it for the purpose of stopping, called the station at which the plaintiff was to alight. After this, as the train was moving slowly, the plaintiff left the car, and stood on the first of four steps that led from the platform of that end, and while in this position the steps came into collision with a truck in charge of a servant of the other defendants, who was in the act of placing it within a space between two parallel tracks, over one of which the train was passing. When the truck was caught by the moving train it struck the steps, bent them under the platform, and caused the plaintiff to be thrown to the ground and injured.

[16] For discussion of principles, see Doble, Bailm. & Carr. §§ 185–187.

[17] Parts of the opinion are omitted.

Plainly, if he had remained in the car until the train stopped, this danger would have been avoided, but he voluntarily left a place provided for him as a passenger, and where he would have been safe, and exposed himself to the chance of injury which common experience has shown is incident to standing upon the platform of a moving railroad car. The fact that the station had been announced, and the train was being reduced in speed preparatory to stopping, or that the combination of conditions causing the accident was peculiar, and ordinarily not to be anticipated, does not furnish a sufficient excuse for his conduct. See Manning v. West End Street Railway, 166 Mass. 230, 232, 44 N. E. 135. Even if it could be found that the baggage master, being a servant of the railroad, might properly announce the stations for the information of passengers, who would be justified in treating such an announcement as an invitation to leave the car, as held in Floytrup v. Boston & Maine Railroad, 163 Mass. 152, 39 N. E. 797, yet this is not an invitation to leave a train while in motion, but after it has regularly stopped. At the farthest it afforded no justification for the plaintiff to leave the car and attempt to finish his journey on the platform or steps. England v. Boston & Maine Railroad, 153 Mass. 490, 492, 27 N. E. 1. As the plaintiff was not compelled by necessity arising from insufficient means of transportation furnished, or by the management of its train on the part of the carrier, or misled by an invitation to leave the place properly provided for his transportation, the action taken by him was for his own convenience, and at his own risk. Hickey v. Boston & Lowell Railroad Co., 14 Allen, 429; Files v. Boston & Albany Railroad Co., 149 Mass. 204, 206, 21 N. E. 311, 14 Am. St. Rep. 411. * * *

PENNSYLVANIA R. CO. v. ASPELL.

(Supreme Court of Pennsylvania, 1854. 23 Pa. 147, 62 Am. Dec. 323.)

BLACK, C. J.[18] The plaintiff below was a passenger in the defendants' cars from Philadelphia to Morgan's Corner. The train should have stopped at the latter place, but some defect in the bell-rope prevented the conductor from making the proper signal to the engineer, who therefore went past, though at a speed somewhat slackened on account of the switches which were there to be crossed. The plaintiff seeing himself about to be carried on, jumped from the platform of the car and was seriously hurt in the foot. He brought this action, and the jury with the approbation of the court, gave him one thousand five hundred dollars in damages.

Persons to whom the management of a railroad is intrusted are bound to exercise the strictest vigilance. They must carry the passengers to their respective places of destination and set them down

[18] The statement of facts and parts of the opinion are omitted.

safely, if human care and foresight can do it. They are responsible for every injury caused by defects in the road, the cars, or the engines, or by any species of negligence, however slight, which they or their agents may be guilty of. But they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness or folly. One who inflicts a wound upon his own body must abide the suffering and the loss, whether he does it in or out of a railroad car. It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained.

A railroad company is not liable to a passenger for an accident which the passenger might have prevented by ordinary attention to his own safety, even though the agents in charge of the train are also remiss in their duty.

From these principles, it follows very clearly that if a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of traveling back; because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence, for which he can blame nobody but himself. If there be any man who does not know that such leaps are extremely dangerous, especially when taken in the dark, his friends should see that he does not travel by railroad.

It is true that a person is not chargeable with neglect of his own safety when he exposes himself to one danger by trying to avoid another. In such a case the author of the original peril is answerable for all that follows. * * * If, therefore, a person should leap from the car under the influence of a well-grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer will be as good as if the same mischief had been done by the apprehended collision itself. When the negligence of the agents puts a passenger in such a situation that the danger of remaining on the cars is apparently as great as would be encountered in jumping off, the right to compensation is not lost by doing the latter; and this rule holds good even where the event has shown that he might have remained inside with more safety. Such was the decision in Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115, so much relied on by the defendant in error. A passenger in a stage-coach, seeing the driver drunk, the horses mismanaged, and the coach about to upset, jumped out, and was thereby much hurt. The court held the

proprietors of the line responsible, because the misconduct of their servant had reduced the passenger to the alternative of a dangerous leap or remaining at great peril. But did the plaintiff in the present case suffer the injury he complains of by attempting to avoid another with which he was threatened? Certainly not. He was in no possible danger of anything worse than being carried on to a place where he did not choose to go. That might have been inconvenient; but to save himself from a mere inconvenience by an act which put his life in jeopardy was inexcusable rashness. * * *

The remark of the court that life and limb should not be weighed against time is most true; and the plaintiff should have thought of it when he set his own life on the hazard of such a leap for the sake of getting to the ground a few seconds earlier. Locomotives are not the only things that may go off too fast; and railroad accidents are not always produced by the misconduct of agents. A large proportion of them is caused by the recklessness of passengers. This is a great evil, which we would not willingly encourage by allowing a premium on it to be extorted from companies. However bad the behavior of those companies may sometimes be, it would not be corrected by making them pay for faults not their own.

The court should have instructed the jury that the evidence, taken altogether (or even excluding that for the defense), left the plaintiff without the shade of a case. Judgment reversed, and venire facias de novo awarded.

JACKSON v. CRILLY.

(Supreme Court of Colorado, 1891. 16 Colo. 103, 26 Pac. 331.)

RICHMOND, C.[19] This action was brought by appellee, plaintiff below, to recover damages for the death of John Crilly, her husband, while a passenger upon the train run and operated by the appellant as receiver of the Denver & Rio Grande Railway Company. The defendant, among other things, pleaded circumstantially that the death of Crilly was caused by his own contributory negligence. The undisputed facts appear to be that the decedent, Crilly, was one of a large number of persons who attended a picnic at or near Mitchell's station on the Red Cliff branch of the Denver & Rio Grande Railway. That on the day of the accident they left Leadville in the morning, and rode safely to the grounds, and spent the day there in the usual manner. That three trains were run to and from the picnic grounds on that day. That Crilly and his friends, some of whom were witnesses in the case, waited until the last train was about to start for Leadville; that the train consisted of passenger coaches and open cars. That the car which Crilly and his friends entered to return to Leadville was an ordinary coal-car with a box about three feet deep,

[19] Part of the opinion is omitted.

with seats across it on the inside, placed about eighteen inches from the top. That there were seats across each end of the car, the box of the car forming a back to these end seats. That upon entering the car Crilly seated himself upon the rear end of the box, and placed his feet upon the seat. The board or railing upon which he sat was about 2½ inches thick. In this manner Crilly rode some 12 or 15 miles over a mountainous country. That at a point between Malta and Leadville, and while running on an up grade, Crilly fell from the car, and was killed. The testimony of Patrick Cleary is that the car which Crilly and he entered to return to Leadville was crowded; that, failing to find a seat, Crilly sat on the back railing of the car, with his feet between two men who sat on the rear seat. Cleary himself was standing up. The testimony of James Jolly was to the effect that the train left the grounds about seven or eight in the evening, when it was still light. That he climbed on the car after it was full. That Crilly got on after him, and sat next to him; that they were in their seats about a quarter of an hour before the train started. That Crilly had drank a few beers during the day. Just after coming around the curve going up grade, there was a jar. That the jar was caused by the quickening of the speed. That he heard shouting, and learned that Crilly had fallen. He said he could stand on the seat, but could not stand on the floor except by crushing his way in so that it would be uncomfortable. "Question. Then you could have stood up there? Answer. By crushing in. Q. By a little inconvenience? A. Yes, sir. Q. Instead of sitting on the end of the car? A. Yes, sir. Q. If you could have done that, Mr. Crilly could have done that also, couldn't he? A. Yes, sir." Peter Jolly testifies that he stood up in the car, and that there was room for more to stand; that the train was running about 10 or 12 miles an hour. Joseph Burns testified that at the time of the accident the train was running smoothly. He did not notice any jolt or jar. The testimony also shows that the car next to the one in which deceased rode was not crowded.

The cause was tried upon the theory that the question of contributory negligence is necessarily one of fact for the jury. In this, we think, there was error. The testimony clearly shows that the deceased was in a place of known danger; that he put himself in this place of danger voluntarily, and, it may be said, recklessly. It is beyond all contradiction that the occupancy of the place of danger caused or contributed to his death. If he had been standing up or seated inside the box, or if he had, within the time after entering the car and ascertaining its crowded condition, and before the starting of the train, sought a position in the next or adjoining car, the lamentable accident would probably not have resulted. It is admitted by the testimony and by the strongest witnesses, and it might be said, by the most willing witnesses, on the part of the plaintiff, that by a little inconvenience to himself he could have stood up in the car as others did, and thus avoided the accident. There was room for him if there were room

for others, and he should have taken a place of safety. He was not an infant, nor non compos. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter the former could not arise. He took upon himself the right and privilege of riding on the rear end of a box-car, seating himself upon a board not exceeding in thickness 2½ inches, with his feet elevated by being placed upon the seat directly in front of him, and with no possible opportunity of protecting himself in case of a sudden jolt or jar of the car; and we cannot escape the conclusion that his death was due to his own folly and recklessness. He himself was the author of his own misfortune. This is shown with as near an approach of demonstration as anything short of mathematics will permit. It is a well-known principle of law that where a man negligently and without excuse places himself in a place of known danger, and thereby suffers an injury at the hands of another, either wholly or partially by means of his own act, he cannot recover damages for the injury sustained. The contributory negligence which prevents recovery for an injury, however, must be such as co-operates in causing the injury, and without which the injury would not have happened.

The true test is: Did the plaintiff's negligence directly contribute to the production of the injury complained of? If it did, there can be no recovery; if it did not, it is not to be considered. "The question of negligence is ordinarily a question of fact, and ought to be submitted, under proper instructions, to the determination of a jury. Where the facts are disputed, where there is any reasonable doubt as to the inference to be drawn from them, or when the measure of duty is ordinary and reasonable care, and the degree varies according to the circumstances, the question cannot, in the nature of the case, be considered by the court; it must be submitted to the jury. But where the facts and inferences therefrom are undisputed, where the precise measure of duty is determinate,—the same under all circumstances,—where a rule of duty in a given exigency may be certified and accurately defined, the question is for the court, and not for the jury." Dewald v. Railroad Co., 44 Kan. 586, 24 Pac. 1101; Railroad Co. v. Greiner, 28 Amer. & Eng. R. Cas. 397; Lord v. Refining Co., 12 Colo. 390, 21 Pac. 148. The case of Railroad Co. v. Hoosey, 99 Pa. 492, 44 Am. Rep. 120, is one somewhat similar to the case at bar. There a passenger in an excursion car was unable to find a seat, owing to the crowded condition of the cars. Although there was standing room inside, he stepped outside of the car while the train was in rapid motion, and placed himself on or near the edge of the platform, with his back against the window, holding on by an iron rail fixed to the car. In this position he rode for some minutes, when a jolt occurred, which threw him to the ground, and inflicted an injury upon him. Suit having been brought by him against the railroad company to recover damages for the injury done him, held,

that he had been guilty of such negligence as to preclude his right of recovery, and that the court should have so instructed the jury. In Hogan v. Railway Co., 15 Amer. & Eng. R. Cas. 439, it was held that "when the facts found lead irrisistibly to the conclusion of negligence or the absence of it, the inference of negligence or the absence of it is purely a conclusion of law; but where the facts found may leave the inference of negligence or no negligence in doubt, the question of negligence is for the jury, because other facts not found are necessarily to be considered and determined before the inference can properly be drawn."

Measuring the testimony of plaintiff's witnesses as above stated by the rule here announced, the court upon the trial might properly have granted defendant's motion for a nonsuit; and, as the testimony of the defendant's witnesses did not improve the plaintiff's case, the verdict and judgment cannot be sustained. Horn v. Reitler, 15 Colo. 316, 25 Pac. 501. There is not in the complaint an averment that in thus providing the box-car for the accommodation of the excursionists the company was negligent or careless. Voluntarily, as one of those who on that day was engaged in the pursuit of pleasure, the deceased entered this crowded car, and assumed a dangerous position, notwithstanding the fact that the adjoining car had ample room in which he could have found convenience, comfort, and safety, and seated himself on the rear end of the car, and in a position which any man of ordinary prudence ought to know was unsafe,—ought to know that in case of the slightest accident or jolt he was liable to fall. No prudent man of ordinary intelligence, sober, in full possession of his faculties, with a due regard for his life, possessing some knowledge of journeying by railroad, and the liability to accident on occasions similar to the one in which deceased lost his life, could fail to conclude that a more perilous situation could not have been assumed by any one than that taken by Crilly. * * *

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7. The Burden of Proof and Presumptions as to Negligence [20]

WILLIAMS v. SPOKANE FALLS & N. RY. CO.

(Supreme Court of Washington, 1905. 39 Wash. 77, 80 Pac. 1100.)

DUNBAR, J.[21] Respondent was a railway postal clerk in the service of the United States. On August 15, 1903, he was one of the clerks in charge of a postal car attached to a train of the appellant running between Spokane and Northport. The car on which he was occupied was, pursuant to the usual custom, detached from the train

[20] For discussion of principles, see Doble, Bailm. & Carr. § 188. See, also, Louisiana & N. W. R. Co. v. Crumpler, ante, p. 326.

[21] Parts of the opinion have been omitted.

at the latter point, and set in on a side track, to be returned to Spokane on the day following. * * *

It is conceded that the respondent was performing his duty on the car, and it is also conceded that the rules of law applying to passengers on a railroad car apply to him. * * * The particular negligence alleged is that, while respondent was in the discharge of his duties in a postal car on a siding at Northport, the appellant's servants and employés negligently ran and propelled against said mail car other cars, by means of a locomotive operated by it, and said mail car was struck by said cars, propelled with great force and violence, pushing it for a distance along and derailing it, thereby throwing respondent down. The answer denied any negligence, and it is contended that there was no negligence shown.

Hawkins v. Front Street Cable Ry. Co., 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72, and Allen v. N. P. Ry. Co., 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804, are relied upon to sustain the appellant's contention. In Hawkins v. Cable Ry. Co., supra, this court held that the following instruction, "It is the law that, where a passenger being carried on a train is injured without fault of his own, there is legal presumption of negligence, casting upon the carrier the burden of disproving it," constituted reversible error, as being too broad a statement of the responsibility of the carrier. There, it will be observed, the instruction overruled had no limitations whatever; and, under that instruction, if the passenger had been injured by some unavoidable accident, disconnected entirely from the railroad company, such as an injury resulting from the discharge of a fire-arm by some one in the car, or through the window by some one outside of the car, the company would have been held responsible. So that it is not enough that the passenger is injured without fault of his own, but the injury must be connected in some way with the operation of the road; and, when the injury is so connected, we think, under the overwhelming weight of authority, that a prima facie case of negligence is made out by the plaintiff, and that the duty devolves upon the company to establish a want of negligence on its part. And the cases cited by this court in that case show that such was the view that the court took of the law. There is nothing in the case of Allen v. N. P. Ry. Co., supra, to sustain appellant's contention.

Mr. Thompson, in his Commentaries on the Law of Negligence, vol. 3, § 2754, very happily expresses the distinction which we have sought to make. The section is as follows: "In every action by a passenger against a carrier to recover damages predicated upon the negligence or misconduct of the latter, the burden of proof in the first instance is, of course, upon the plaintiff to connect the defendant in some way with the injury for which he claims damages. But when the plaintiff has sustained and discharged this burden of proof by showing that the injury arose in consequence of the failure, in some respect or other, of

the carrier's means of transportation, or the conduct of the carrier's servants, then, in conformity with the maxim res ipsa loquitur, a presumption arises of negligence on the part of the carrier or his servants, which, unless rebutted by him to the satisfaction of the jury, will authorize a verdict and judgment against him for the resulting damages. Stated somewhat differently, the general rule may be said to be that where an injury happens to the passenger in consequence of the breaking or failure of the vehicle, roadway, or other appliance owned or controlled by the carrier, and used by him in making the transit, or in consequence of the act, omission, or mistake of his servants, the person entitled to sue for the injury makes out a prima facie case for damages against the carrier by proving the contract of carriage; that the accident happened in consequence of such breaking or failure, or such act, omission, or mistake of his servants; and that in consequence of the accident the plaintiff sustained damage." And in section 2756, showing that the presumption arises not from the happening of the accident, but from a consideration of the cause of the accident, it is further said: "It has been pointed out by an able judge that the presumption which arises in these cases does not arise from the mere fact of the injury, but from a consideration of the cause of the injury. Thus it was said by Ruggles, J.: 'A passenger's leg is broken while on his passage in the railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises—not, however, from the fact that the leg was broken, but from the circumstances attending the fact.'" And a wilderness of cases is cited to sustain the announcement of the text.

The cases on this subject are collated in the Century Digest, vol. 9, commencing on page 1235, and the doctrine is almost universally announced that the fact that an injury results from a railroad collision without any fault of the passenger is prima facie evidence of carelessness, negligence, or want of skill on the part of the company, and the burden is upon it to prove that the accident was not occasioned by the fault of its agents. Goble v. Delaware, L. & W. R. Co., Fed. Cas. No. 5,488a; Smith v. St. Paul City Ry. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98; Chicago City Ry. Co. v. Engel, 35 Ill. App. 490; Central Pass. Ry. Co. v. Bishop, 9 Ky. Law Rep. 348; N. C. St. Ry. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899—and many other cases too numerous to cite, the circumstances of which are parallel in principle with the circumstances in this case, support the law announced. This is also in accordance with a decision made by this court in Walker v. McNeill, 17 Wash. 582, 50 Pac. 518, where it was said: "Whenever a car or train leaves the track, it proves that either the

track or machinery, or some portion thereof, is not in proper condition, or that the machinery is not properly operated." And this is the just and equitable rule, for the cause of the accident is within the knowledge of the railroad company, while it might be a difficult matter for the plaintiff to prove what the cause of the accident was. * * *

IV. Contracts Limiting the Liability of the Carrier of Passengers [22]

NORTHERN PAC. RY. CO. v. ADAMS et al.

(Supreme Court of the United States, 1904. 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513.)

Mr. Justice BREWER.[23] * * * Did the company omit any duty which they owed to the decedent? He was riding on a pass which provided that the company should "not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person." He was a free passenger, paying nothing for the privilege given him of riding in the coaches of the defendant. He entered those coaches as a licensee, upon conditions which he, with full knowledge, accepted. He was not a passenger for hire, such as was held to be the condition of the parties recovering in New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, and Grand Trunk R. Co. v. Stevens, 95 U. S. 655, 24 L. Ed. 535. In the first of these cases Mr. Justice Bradley, who delivered the opinion of the court, closed an elaborate discussion of the questions with these words: "We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire."

The question, then, is distinctly presented whether a railroad company is liable in damages to a person injured through the negligence of its employés, who at the time is riding on a pass given as a gratuity, and upon the condition, known to and accepted by him, that it shall not be responsible for such injuries. It will be perceived that the question excludes injuries resulting from willful or wanton acts, but applies only to cases of ordinary negligence. The facts of this case certainly do not call for any broader inquiry than this. The specific matters of negligence charged are the placing a nonvestibuled car in a vestibuled train, and the high rate of speed at which the train passed

[22] For discussion of principles, see Dobie, Bailm. & Carr. § 190.

[23] The statement of facts and parts of the opinion are omitted.

around the curve at the place of injury. But nonvestibuled cars are in constant use all over the country,—were the only cars in use up to a few years ago,—and further, the deceased, having passed over the open platform, knew exactly its condition. As the court charged the jury: "Mr. Adams must be presumed to have known that it was not vestibuled, and to have acted with perfect knowledge of the fact." The rate of speed was no greater than is common on other trains everywhere in the land, and the train was, in fact, run safely on this occasion. We shall assume however, but without deciding, that the jury were warranted, considering the absence of the vestibuled platform and the high rate of speed in coming around the curve, in finding the company guilty of negligence; but clearly it was not acting either willfully or wantonly in running its trains at this not uncommon rate of speed, and all that can at most be said is that there was ordinary negligence. Is the company responsible for injuries resulting from ordinary negligence to an individual whom it permits to ride without charge on condition that he take all the risks of such negligence?

This question has received the consideration of many courts, and been answered in different and opposing ways. We shall not attempt to review the cases in state courts. * * *

Turning to the decisions of this court, in Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. Ed. 502, and The New World v. King, 16 How. 469, 14 L. Ed. 1019, the parties injured were free passengers, but it does not appear that there were any stipulations concerning the risk of negligence, and the companies were held guilty of gross negligence. In Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. Ed. 560, 20 Sup. Ct. 385, Voigt, an express messenger riding in a car set apart for the use of an express company, was injured by the negligence of the railway company. There was an agreement between the two companies that the former would hold the railway company free from all liability for negligence, whether caused by the negligence of the railway company or its employés. Voigt, entering into the employ of the express company, signed a contract in writing, whereby he agreed to assume all the risk of accident or injury in the course of his employment, whether occasioned by negligence or otherwise, and expressly ratified the agreement between the express company and the railway company. It was held that he could not maintain an action against the railway company for injuries resulting from the negligence of its employés. * * *

In the light of this decision but one answer can be made to the question. The railway company was not, as to Adams, a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common-law obligations to

him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered; and, having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby. * * *

V. Liability of the Carrier to Persons Other than Passengers [24]

MORGAN v. OREGON SHORT LINE RY. CO.

(Supreme Court of Utah, 1903. 27 Utah, 92, 74 Pac. 523.)

The plaintiff brought this action to recover damages for the death of his son, which he alleges in his complaint to have been caused by the "reckless, wanton, negligent, unlawful, willful, and malicious conduct of the defendant and its servants" in the operation of the railway company's train. * * * The five trespassers on top of the train rode there until the second or third stop was made, when some one, they having been discovered, required them to get down. As they got down, they immediately ran around the rear end to the west side of the train, and got on there, and, as the Hunsacker boys passed along on the west side, they, according to their testimony, saw Morgan helping Olsen up on the steps under the vestibule doors at the front end of the rear car, and they saw Morgan climb up onto the steps at the rear end of the second car. After the train had started and was running, according to the testimony of the Hunsacker boys, about as fast as a man could run to keep up with it, a trainman with a lantern ran along the side of the train from the rear end to Olsen, and, taking him by the leg, pulled him off the train. He then went to Morgan and pulled him off likewise. Both fell to the ground on the west side of the track as they were pulled off, and Olsen rolled out across some ice. The trainman then got on board the train at the rear end of the last car as it passed by, and, it appears, no one saw what became of Olsen and Morgan, or what they did after they were pulled off the train. * * *

BARTCH, J.[25] * * * The deceased was not a passenger, and there was no obligation imposed by law upon the railway company to

[24] For discussion of principles, see Dobie, Bailm. & Carr. § 191.

[25] Parts of the statement of facts and of the opinion are omitted.

carry him safely. There were no contract relations existing between him and the railway company. Nor were the parties brought into such a situation that they had relative rights, so that out of their relations a duty on the part of the company arose other than what it owes to a trespasser. The deceased, with his companions in wrong, was a mere naked trespasser, with intent to perpetrate a wrong upon the company by attempting to secure a ride upon its train without payment of fare. When he boarded the train, as he did, without right, he assumed all the risks incident to his perilous undertaking, and the company owed him no duty and was under no responsibility to him, except to prevent its servants, while acting within the scope of their employment, from inflicting any willful, wanton, or intentional injury upon him. "Under settled rules of public policy, railway companies are not to be made liable for injuries received by trespassers upon their trains, unless the injury is inflicted under circumstances indicating wantonness or willfulness in the servants of the companies." Railway Co. v. Burnsed, 70 Miss. 437, 12 South. 958, 35 Am. St. Rep. 656; I. C. R. R. Co. v. King, 179 Ill. 91, 53 N. E. 552, 70 Am. St. Rep. 93; Planz v. Boston & A. R. R. Co., 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835; P. C. C. & St. L. Ry. Co. v. Redding, 140 Ind. 101, 39 N. E. 921, 34 L. R. A. 767; Bess v. C. & O. R. Co., 35 W. Va. 492, 14 S. E. 234, 29 Am. St. Rep. 820; Railroad Co. v. Meacham, 91 Tenn. 428, 19 S. W. 232.

Viewed in the light of the foregoing principles, is the evidence now before us such as to entitle the plaintiff to recover damages against the railway company? In determining this question we will assume, although it is not clearly proven, that an employé of the company pulled the deceased from the train or steps of the car. The burden of proof was upon the plaintiff to show that the employé willfully, intentionally, or wantonly caused the injury which resulted in death, and, unless the act of pulling the deceased from the steps of the car occasioned such injury, there is absolutely no evidence to render the company liable, for there is no proof whatever, that subsequent to that occurrence, any one of its employés either saw or laid hands on the deceased. Now, the transaction of pulling the deceased from the steps, according to the undisputed testimony—in fact, according to the plaintiff's own testimony—occurred at the next to the last stop the train made for the purpose of ejecting these trespassers, at a place about six or seven miles north of Brigham City, on the west side of the train, and the following morning the dead body was found about eight miles north of Brigham City, lying on the east side of the railroad track. So that the only act in evidence upon which the plaintiff could at all rely for a recovery was done or committed on the west side of the railway track, at a point from one to two miles south of the place where the body was found on the east side of the track. Turning now to the pleadings, it will be observed that the plaintiff alleges that the deceased died "immediately" upon "his skull being crushed and broken," and the proof shows

the injury to have been of such a character as would produce death instantaneously. The injury having thus admittedly caused instant death, it is manifest that the act of the employé was not the cause thereof. This is a fact, as will be noticed, which is susceptible of demonstration from the proof submitted by the plaintiff himself, as well as from the whole evidence.

To pursue the evidence further in detail would be useless, for it is apparent that when the plaintiff rested he had not made out a prima facie case, and that at the close of the case there was no proof to justify the verdict. The railway company had a right to stop its train and eject the trespassers, and in doing so it had the right to use such force, in a reasonable way, under the circumstances, as was necessary to accomplish that object. In doing this it was, as we have seen, liable only for willful, wanton, or intentional injury inflicted by its servants. The proof shows no such injury. Nor does this evidence disclose any chain of circumstances which justifies an inference of such injury, or that more force was used than was necessary to rid the train of these parties. The repeated and persistent efforts of these wrongdoers to accomplish their unlawful designs the proof shows to have been of such a character as to merit the condemnation of a court of justice. The parties were not only committing a wrong against the railway company, but also against the passengers, who, because of the unlawful purposes of the trespassers, were disturbed and delayed on their journey. Upon careful examination of this record it is difficult to see how reasonable minds can differ as to the effect of, and inference to be drawn from, the evidence. The inevitable conclusion from the proof seems to be that the plaintiff has shown no right of recovery because of the unfortunate death of his son. * * *

THE RIGHTS OF THE COMMON CARRIER OF PASSENGERS

I. The Regulations of the Carrier [1]

BIRMINGHAM RY., LIGHT & POWER CO. v. McDONOUGH.

(Supreme Court of Alabama, 1907. 153 Ala. 122, 44 South. 960, 13 L. R. A. [N. S.] 445, 127 Am. St. Rep. 18.)

Action by J. H. McDonough against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals.

DENSON, J.[2] This is a suit by a passenger against a street railway company, as a common carrier, to recover damages for an alleged unlawful ejection of the plaintiff from a car by the conductor before the plaintiff had reached his destination. Only one assignment of error is insisted upon—that which challenges the correctness of the judgment of the court in sustaining a demurrer to plea 4.

By this plea the defense attempted to be made is, that at the time the wrongs and injuries complained of occurred the defendant was running or operating two cars, the front one a motor car, and the rear one a "trailer," which was attached to the motor; that defendant had a separate conductor in charge of each of said cars; that plaintiff first took passage on the motor car, and, while thereon, paid his fare to the conductor of that car; that thereafter plaintiff got off the motor car, and boarded and took passage on the trailer car; that the conductor on the trailer demanded fare of the plaintiff, and that plaintiff refused and failed to pay the conductor a fare entitling him to be carried as a passenger, whereupon the conductor, on account of plaintiff's refusal to pay the fare, ejected him, using no more force than was necessary. In the plea it is further averred that at the time the defendant had in force a rule which required the conductor in charge of the motor car to collect a fare from each passenger on that car, and the conductor of the trailer to collect a fare from each passenger on that car, and that said rule or regulation did not permit a passenger who had already paid fare on one of the cars to ride on the other without also paying his fare on that car. The plea avers, further, that the rule is a reasonable one, and that plaintiff was advised of its existence before he was ejected; that plaintiff, without the payment of an additional fare, could have resumed his journey by again getting

[1] For discussion of principles, see Doble, Bailm. & Carr. § 192.

[2] Parts of the opinion are omitted.

on board the motor car, but that he refused to do this. It is settled law in this jurisdiction, as it is elsewhere, that a common carrier of passengers is clothed with a common-law right to make reasonable rules and regulations for the conduct of his or its business; further, that the reasonableness or not of a given rule is a question of law for the court, and not one of fact to be determined by the jury. 6 Cyc. 545 (C), and authorities in note 62 to the text; Pullman Car Co. v. Krauss, 145 Ala. 395, 40 South. 398, 4 L. R. A. (N. S.) 103, 8 Ann. Cas. 218, and authorities there cited.

The question, then, is the reasonableness vel non of the rule set up in the plea. It may be said to be common knowledge that street cars in the city of Birmingham are usually crowded—at least, that they are frequently so. Therefore the conductor is not presumed to know all of his passengers. He must necessarily be a stranger to a large portion of them, and not acquainted with their character for truthfulness. If passengers are allowed, and have the privilege of boarding one car and moving from that to another car—the two being coupled together, as the plea in this instance shows the cars were joined—it would be a very easy matter for a passenger to board one car and move to the other, and claim, when called upon for his fare, that he had paid on the other car, when in truth he had not; and the different conductor could have no means of knowing that the moving passenger had paid fare. We recognize the fact that this attributes to men an evil design; but at the same time observation and common knowledge will bear out the truthfulness of the statement that such characters are not too few. And the rule, in one phase, is for the protection of the carrier against such as would impose on it in this way; and as it would be impracticable to limit such a rule, in its terms, to such persons as would intentionally practice a fraud, it must cover all—good and bad—alike. Again, as is suggested in brief of appellant's counsel, it is common knowledge that conductors are required to "register up" each fare collected in their proper cars, and are required to collect from and register each passenger on each car. This check on the conductors would be rendered valueless if passengers were allowed to change from one car to another—each car having a separate conductor—without paying fare. We are of the opinion, and so hold, that the rule pleaded is a reasonable one, in the proper conduct of the business of the defendant, and necessary to protect it against imposition. Nashville Street Ry. v. Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451; Hibbard v. N. Y. & Erie Ry. Co., 15 N. Y. 455; Lasker v. Third Avenue R. R. Co., 27 Misc. Rep. 824, 57 N. Y. Supp. 395; Faber v. Chicago G. W. Ry. Co., 62 Minn. 433, 64 N. W. 918, 36 L. R. A. 789; 2 Hutchinson on Carriers (3d Ed.) § 1077. * * *

The insistence that the plea is bad, for that it fails to aver knowledge of the rule on the part of the plaintiff before he boarded the car from which he was ejected, is not sound. The plea avers that plain-

tiff was advised of the rule before he was ejected and that he might return to the motor car. In view of this averment, it was not necessary that he should have had knowledge of the rule before he boarded the car. Morris v. Railroad Co., 116 N. Y. 552, 22 N. E. 1097; 2 Hutchinson on Carriers (3d Ed.) § 1077; Hutchinson on Carriers (2d Ed.) § 587. * * *

The court erred in sustaining the demurrer to plea 4, and on account of the error the judgment is reversed, and the cause will be remanded. Reversed and remanded.

FORSEE v. ALABAMA GREAT SOUTHERN R. CO.

(Supreme Court of Mississippi, 1885. 63 Miss. 66, 56 Am. Rep. 801.)

The plaintiff, after boarding the train of the defendant, tendered the conductor 35 cents, the usual fare to his destination. The plaintiff explained to the conductor that he had been unable to secure a ticket before boarding the train, owing to the absence of the ticket agent. Plaintiff's tender was refused by the conductor, who explained that under the regulations of the carrier he was required to demand 50 cents as fare from passengers between the stations in question, when the passenger failed to procure a ticket before boarding the train. After stopping the train, the conductor seized the plaintiff for the purpose of ejecting him, whereupon the plaintiff, under protest, paid the 50 cents. This action was brought against the carrier by the plaintiff to recover damages for the alleged misconduct of the conductor as above set out. At the trial, the lower court excluded evidence showing that the plaintiff had been unable to procure a ticket, owing to the neglect of the ticket agent. From a judgment in favor of the plaintiff for $50, without costs, the plaintiff appealed.

ARNOLD, J.[a] * * * It is competent for a railroad corporation to adopt reasonable rules for the conduct of its business, and to determine and fix, within the limits specified in its charter and existing laws, the fare to be paid by passengers transported on its trains. It may, in the exercise of this right, make discrimination as to the amount of fare to be charged for the same distance, by charging a higher rate when the fare is paid on the train than when a ticket is purchased at its office. Such a regulation has been very generally considered reasonable and beneficial both to the public and the corporation, if carried out in good faith. It imposes no hardship or injustice upon passengers, who may, if they desire to do so, pay their fare and procure tickets at the lower rate before entering the cars, and it tends to protect the corporation from the frauds, mistakes, and inconvenience incident to collecting fare and making change on trains while in mo-

[a] The statement of facts has been rewritten, and part of the opinion omitted.

tion, and from imposition by those who may attempt to ride from one station to another without payment, and to enable conductors to attend to the various details of their duties on the train and at stations. State v. Goold, 53 Me. 279; Jeffersonville Railroad Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276; Swan v. Manchester, etc., Railroad Co., 132 Mass. 116, 42 Am. Rep. 432.

But such a regulation is invalid, and cannot be sustained, unless the corporation affords reasonable opportunity and facilities to passengers to procure tickets at the lower rate, and thereby avoid the disadvantage of such discrimination. When this is done, and a passenger fails to obtain a ticket, it is his own fault, and he may be ejected from the train if he refuses to pay the higher rate charged on the train.

When such a regulation is established, and a passenger endeavors to buy a ticket before he enters the cars, and is unable to do so on account of the fault of the corporation or its agents or servants, and he offers to pay the ticket rate on the train, and refuses to pay the car rate, it is unlawful for the corporation or its agents or servants to eject him from the train. He is entitled to travel at the lower rate, and the corporation is a trespasser and liable for the consequences if he is ejected from the train by its agents or servants. The passenger may, under such circumstances, either pay the excess demanded under protest, and afterwards recover it by suit, or refuse to pay it, and hold the corporation responsible in damages if he is ejected from the train. 1 Redfield on Railways, 104; Evans v. M. & C. Railroad Co., 56 Ala. 246, 28 Am. Rep. 771; St. Louis, etc., Railroad Co. v. Dalby, 19 Ill. 353; St. Louis, etc., Railroad Co. v. South, 43 Ill. 176, 92 Am. Dec. 103; Smith v. Pittsburg, etc., Railroad Co., 23 Ohio St. 10; Porter v. N. Y. Central Railroad Co., 34 Barb. (N. Y.) 353; Jeffersonville Railroad Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276; Jefferson Railroad Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; State v. Goold, 53 Me. 279; Swan v. Manchester, etc., R. Co., 132 Mass. 116, 42 Am. Rep. 432; Du Laurans v. St. Paul, etc., R. Co., 15 Minn. 49 (Gil. 29), 2 Am. Rep. 102.

In such case exemplary damages would not be recoverable, unless the expulsion or attempted expulsion was characterized by malice, recklessness, rudeness, or willful wrong on the part of the agents or servants of the corporation. Chicago, etc., R. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373; Du Laurans v. St. Paul, etc., R. Co., 15 Minn. 49 (Gil. 29), 2 Am. Rep. 102; Pullman, etc., v. Reed, 75 Ill. 125, 20 Am. Rep. 232; Hamilton v. Third Avenue R. Co., 53 N. Y. 25; Townsend v. N. Y. Cent. R. Co., 56 N. Y. 295, 15 Am. Rep. 419; Paine v. C. R. I. & P. R. Co., 45 Iowa, 569; McKinley v. C. & N. W. R. Co., 44 Iowa, 314, 24 Am. Rep. 748.

The cause was tried in the court below on theories and principles of law different from those here expressed, and the judgment is reversed and a new trial awarded.

II. Tickets [4]

FONSECA v. CUNARD S. S. CO., Limited.

(Supreme Judicial Court of Massachusetts, 1891. 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660.)

KNOWLTON, J.[5] * * * The principal question before us is whether the plaintiff, by reason of his acceptance and use of his ticket, shall be conclusively held to have assented to its terms. It has often been decided that one who accepts a contract and proceeds to avail himself of its provisions is bound by the stipulations and conditions expressed in it, whether he reads them or not. Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Insurance Co. v. Buffum, 115 Mass. 343; Rice v. Manufacturing Co., 2 Cush. (Mass.) 80; Hoadley v. Transportation Co., 115 Mass. 304, 15 Am. Rep. 106; Insurance Co. v. Railroad Co., 72 N. Y. 90, 28 Am. Rep. 113. This rule is as applicable to contracts for the carriage of persons or property as to contracts of any other kind. Grace v. Adams, ubi supra; Railroad Co. v. Chipman, 146 Mass. 107, 14 N. E. 940, 4 Am. St. Rep. 293; Parker v. Railway Co., 2 C. P. Div. 416, 428; Harris v. Railway Co., 1 Q. B. Div. 515; York Co. v. Railroad Co., 3 Wall. 107, 18 L. Ed. 170; Hill v. Railroad Co., 73 N. Y. 351, 29 Am. Rep. 163. The cases in which it is held that one who receives a ticket which appears to be a mere check showing the points between which he is entitled to be carried, and which contains conditions on its back which he does not read, is not bound by such conditions, do not fall within this rule. Brown v. Railway Co., 11 Cush. (Mass.) 97; Malone v. Railroad Corp., 12 Gray (Mass.) 388, 74 Am. Dec. 598; Henderson v. Stevenson, L. R. 2 H. L. Sc. 470; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Railway Co. v. Stevens, 95 U. S. 655, 24 L. Ed. 535. Such a ticket does not purport to be a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unusual stipulations.

The precise question in the present case is whether the "contract ticket" was of such a kind that the passenger taking it should have understood that it was a contract containing stipulations which would determine the rights of the parties in reference to his carriage. If so, he would be expected to read it, and, if he failed to do

[4] For discussion of principles, see Doble, Bailm. & Carr. §§ 193, 194.

[5] The statement of facts and parts of the opinion have been omitted.

so, he is bound by its stipulations. It covered with print and writing the greater part of two large quarto pages, and bore the signature of the defendant company, affixed by its agent, with a blank space for the signature of the passenger. The fact that it was not signed by the plaintiff is immaterial. Quimby v. Railroad Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846, and cases there cited. It contained elaborate provisions in regard to the rights of the passenger on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day of the week. No one who could read could glance at it without seeing that it undertook expressly to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination. In that particular it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads.

In reference to this question, the same rules of law apply to a contract to carry a passenger as to a contract for the transportation of goods. There is no reason why a consignor who is bound by the provisions of a bill of lading which he accepts without reading should not be equally bound by the terms of a contract in similar form to receive and transport him as a passenger. In Henderson v. Stevenson, ubi supra, the ticket was for transportation a short distance,—from Dublin to Whitehaven,—and the passenger was held not bound to read the notice on the back because it did not purport to be a contract, but a mere check given as evidence of his right to carriage. In later English cases it is said that this decision went to the extreme limit of the law, and it has repeatedly been distinguished from cases where the ticket was in a different form. Parker v. Railway Co., 2 C. P. Div. 416, 428; Harris v. Railway Co., 1 Q. B. Div. 515; Burke v. Railway Co., 5 C. P. Div. 1. The passenger in the last-mentioned case had a coupon ticket, and it was held that he was bound to know what was printed as a part of the ticket. Steers v. Steam-Ship Co., 57 N. Y. 1, 15 Am. Rep. 453, is in its essential facts almost identical with the case at bar, and it was held that the passenger was bound by the conditions printed on the ticket. In Quimby v. Railroad Co., ubi supra, the same principle was applied to the case of a passenger traveling on a free pass, and no sound distinction can be made between that case and the case at bar. We are of opinion that the ticket delivered to the plaintiff purported to be a contract, and that the defendant corporation had a right to assume that he consented to its provisions. All these provisions are equally binding on him as if he had read them. * * *

BOYLAN v. HOT SPRINGS R. CO.

(Supreme Court of the United States, 1889. 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290.)

This was an action of assumpsit against a railroad corporation by a person who, after taking passage on one of its trains, was forcibly expelled by the conductor. At the trial in the circuit court, the plaintiff testified that on March 18, 1882, he purchased at the office of the Wabash, St. Louis & Pacific Railway Company, in Chicago, a ticket for a passage to Hot Springs and back, * * * (which, as was alleged in the declaration and appeared upon the face of the ticket, was then signed by him as well as by the ticket agent, and witnessed by a third person,) and upon this ticket traveled on the defendant's railroad to Hot Springs. He was asked by his counsel when he first actually knew that the ticket required him to have it stamped at Hot Springs. The question was objected to by the defendant, and ruled out by the court. He further testified that on April 19, 1882, when leaving Hot Springs on his return to Chicago, he went to the baggage-office, and requested the baggage-master to check his baggage, and, on his asking to see the ticket, showed it to him, and he thereupon punched the ticket, checked the baggage, and gave him the checks for it; and also that the gateman asked to see the ticket, and he showed it to him, and then passed through the gate, and took his seat in the cars. This testimony was objected to by the defendant, on the ground that no statement or action of the baggage-master or of the gateman would constitute a waiver of any of the written conditions of the contract; and it was admitted by the court, subject to the objection. The plaintiff then testified that soon after leaving Hot Springs the conductor, in taking the tickets of passengers, came to him, and, upon being shown his ticket, said it was not good because he had failed to have it stamped at Hot Springs. The plaintiff replied that the baggage-master, when checking his baggage, had said nothing to him about it, and he did not know it was necessary. The conductor answered that he must either go back to Hot Springs and have the ticket stamped, or else pay full fare, but did not demand any specific sum of fare, or tell him what the fare was, and, upon his refusing to pay another fare or to leave the train, forcibly put him off at the next station, notwithstanding he resisted as much as he could, and in so doing injured him in body and health.

On motion of the defendant, upon the grounds, among others, that this was an action of assumpsit for breach of contract, and that the plaintiff failed to produce to the conductor a ticket or voucher which entitled him to be carried on the train, and that until the plaintiff identified himself at the office at Hot Springs, and had the ticket stamped and signed by the agent there, he had no

subsisting contract between himself and the defendant for a return passage to Chicago, the court declined to permit the plaintiff to testify to the consequent injury to his business and to his ability to earn money, excluded all evidence offered as to the force used in removing him from the train, and as to his expulsion from the train, (although corresponding to allegations inserted in the declaration,) and directed a verdict for the defendant. The plaintiff excepted to the rulings of the court, and, after verdict and judgment for the defendant, sued out this writ of error.

Mr. Justice GRAY,[6] after stating the facts as above, delivered the opinion of the court.

This is an action of assumpsit, and cannot be maintained without proof of a breach of contract by the defendant to carry the plaintiff. The only contract between the parties was an express one, signed by the plaintiff himself as well as by the defendant's agent at Chicago, and contained in a ticket for a passage to Hot Springs and back. The plaintiff, having assented to that contract by accepting and signing it, was bound by the conditions expressed in it, whether he did or did not read them or know what they were. The question, when he first knew that the ticket required him to have it stamped at Hot Springs, was therefore rightly excluded as immaterial.

By the express conditions of the plaintiff's contract, he had no right to a return passage under his ticket, unless it bore the signature and stamp of the defendant's agent at Hot Springs; and no agent or employé of the defendant was authorized to alter, modify, or waive any condition of the contract. Neither the action of the baggage-master in punching the ticket and checking the plaintiff's baggage, nor that of the gateman in admitting him to the train, therefore, could bind the defendant to carry him, or estop it to deny his right to be carried.

The plaintiff did not have his ticket stamped at Hot Springs, or make any attempt to do so, but insisted on the right to make the return trip under the unstamped ticket, and without paying further fare. As he absolutely declined to pay any such fare, the fact that the conductor did not inform him of its amount is immaterial. The unstamped ticket giving him no right to a return passage, and he not having paid, but absolutely refusing to pay, the usual fare, there was no contract in force between him and the defendant to carry him back from Hot Springs. There being no such contract in force, there could be no breach of it; and, no breach of contract being shown, this action of assumpsit, sounding in contract only, and not in tort, cannot be maintained to recover any damages, direct or consequential, for the plaintiff's expulsion from the defendant's train. The plaintiff, therefore, has not been prejudiced by the ex-

[6] Part of the statement of facts and part of the opinion are omitted.

clusion of the evidence concerning the circumstances attending his expulsion, and the consequent injuries to him or his business.

The case is substantially governed by the judgment of this court in Mosher v. Railway Co., 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249, and our conclusion in the case at bar is in accord with the general current of decision in the courts of the several states. See, besides the cases cited at the end of that judgment, the following: Churchill v. Railroad Co., 67 Ill. 390; Petrie v. Railroad Co., 42 N. J. Law, 449; Pennington v. Railroad Co., 62 Md. 95; Rawitzky v. Railroad Co., 40 La. Ann. 47, 3 South. 387. Nor was anything inconsistent with this conclusion decided in either of the English cases relied on by the learned counsel for the plaintiff. Each of those cases turned upon the validity and effect of a by-law made by the railway company, not of a contract signed by the plaintiff, and otherwise essentially differed from the case at bar. * * *

III. Conclusiveness of Ticket Between Passenger and Conductor [7]

FREDERICK v. MARQUETTE H. & O. R. CO.

(Supreme Court of Michigan, 1877. 37 Mich. 342, 26 Am. Rep. 531.)

MARSTON, J.[8] This is an action on the case brought to recover damages for being unlawfully ejected and put off a train of cars by the conductor of the train. The evidence on the part of the plaintiff tended to show that on the evening of January 29th, 1876, he went to the regular ticket office of the defendant at Ishpeming and asked for a ticket to Marquette, presenting to the agent in charge of the office one dollar from which to make payment therefor; that the agent received the money, handed plaintiff a ticket and some change, retaining sixty-five cents for the ticket, the regular fare to Marquette; that the plaintiff did not attempt to read what was on his ticket, nor did he count the change received back until next morning or notice it until then; that he went on board the train bound for Marquette, and after the train left the station the conductor took up the ticket, giving him no check to indicate his destination, but at the time telling him his ticket was only for Morgan; that when the train reached Morgan the conductor told the plaintiff he must get off there or pay more fare; that if he wanted to go to Marquette he must pay thirty-five cents more. Plaintiff in-

[7] For discussion of principles, see Dobie, Bailm. & Carr. § 195.

[8] Parts of the opinion of Marston, J., are omitted.

sisted he had paid his fare and purchased his ticket to Marquette and refused to pay the additional fare, whereupon he was ejected from the train, etc. On the part of the defendant, evidence was given tending to show that the ticket purchased and presented to the conductor was in fact a ticket for Morgan and not for Marquette. Under the pleadings and charge of the court other evidence in the case and questions sought to be raised need not be referred to, and as the real gist of the action was for the expulsion from the cars by the conductor, the above statement is deemed sufficient to a proper understanding of the case. * * *

What, then, is the duty of the conductor in a case like the present? and what are the passengers's rights? In considering these questions we cannot shut our eyes to the manner and method which railroad companies and common carriers generally have adopted in order to successfully carry out their business. The view to be taken of these questions must be a practical one, even although it may work, perhaps, injustice in some special and particular cases, resulting, however, in great part, if not wholly, from other causes. * * *

It is within the common knowledge or experience of all travelers that the uniform and perhaps the universal practice is for railroad companies to issue tickets to passengers with the places designated thereon from whence and to which the passenger is to be carried; that these tickets are presented to the conductor or person in charge of the train and that he accepts unhesitatingly of such tickets as evidence of the contract entered into between the passenger and his principal. It is equally well known that the conductor has but seldom if ever any other means of ascertaining, within time to be of any avail, the terms of the contract, unless he relies upon the statement of the passenger, contradicted as it would be by the ticket produced, and that even in a very large majority of cases, owing to the amount of business done, the agent in charge of the office, and who sold the ticket, could give but very little if any information upon the subject. That this system of issuing tickets, in a very large majority of cases, works well, causing but very little if any annoyance to passengers generally, must be admitted. There of course will be cases where a passenger who has lost his ticket, or where through mistake the wrong ticket had been delivered to him, will be obliged to pay his fare a second time in order to pursue his journey without delay, and if unable to do this, as will sometimes be the case, very great delay and injury may result therefrom. Such delay and injury would not be the natural result of the loss of a ticket or breach of the contract, but would be, at least in part, in consequence of the pecuniary circumstances of the party. Such cases are exceptional, and however unfortunate the party may be who is so situate, yet we must remember that no human rule has ever yet been devised that would not at times injuriously affect those it

was designed to accommodate. This method of purchasing tickets is also of decided advantage to the public in other respects; it enables them to purchase tickets at times and places deemed suitable, and to avoid thereby the crowds and delays they would otherwise be subject to. Were no tickets issued and each passenger compelled to pay his fare upon the cars, inconvenience and delay would result therefrom, or the officers in charge of the train to collect fares would be increased in numbers to an unreasonable extent, while at fairs and places of public amusement where tickets are issued and sold entitling the purchaser to admission and a seat, we can see and appreciate the confusion which would exist if no tickets were sold, or if the party presenting the ticket were not upon such occasions to be bound by its terms.

How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically there are but two ways,—one, the evidence afforded by the ticket; the other the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law, parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to the facts, which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of a contract, where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the travelling public generally. There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to its terms, or, if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case.

We have not thus far referred to any authorities to sustain the views herein taken. If any are needed, the following, we think,

will be found amply sufficient, and we do not consider it necessary to analyze or review them. Townsend v. N. Y. C. & H. R. R. R. Co., 56 N. Y. 298, 15 Am. Rep. 419; Hibbard v. N. Y. & E. R. R., 15 N. Y. 470; Bennett v. N. Y. C. & H. R. R., 5 Hun (N. Y.) 600; Downs v. N. Y. & N. H. R. R., 36 Conn. 287, 4 Am. Rep. 77; C., B. & Q. R. R. v. Griffin, 68 Ill. 499; Pullman P. C. Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232; Shelton v. Lake Shore, etc., Ry. Co., 29 Ohio St. 214.

I am of opinion that the judgment should be affirmed with costs.

COOLEY, C. J., concurred.

GRAVES, J. By mistake the company's ticket agent issued and plaintiff accepted a ticket covering a shorter distance than that bargained and paid for; and having ridden under it the distance which it authorized, and refusing to repay for the space beyond, the plaintiff was removed from the cars.

This removal may, or may not, have constituted a cause of action, but it is not the cause of action charged. The declaration sets up that plaintiff's ticket was a proper one for the whole distance and that he was removed in violation of the right which the ticket made known to the conductor.

There was no proof of the case alleged, and I agree therefore in affirming the judgment.

CAMPBELL, J. The plaintiff's cause of action in this case was for the failure of the company to carry him to a destination to which he had paid the passage money, and the immediate occasion for his removal from the cars was that he was given a wrong ticket, and was not furnished with such a one as the conductor was instructed to recognize as entitling him to the complete carriage. His declaration should have been framed on this theory. Had it been so framed, I am not prepared to say that he may not have had a right of action for more than the difference in the passage money.

But as he counted on the failure of the conductor to respect a correct ticket, and it appears that the conductor gave him all the rights which the ticket produced called for, there was no cause of action made out under the delaration, and the rule of damages need not be considered. I concur in affirming the judgment.

EVANSVILLE & T. H. R. CO. v. CATES.

(Appellate Court of Indiana, 1895. 14 Ind. App. 172, 41 N. E. 712.)

Action by James T. Cates against the Evansville & Terre Haute Railroad Company to recover damages for a wrongful ejectment from defendant's train. From a judgment for plaintiff, defendant appeals. Affirmed.

GAVIN, J.[9] The appellee, desiring to travel from Evansville to Terre Haute over appellant's railroad, called upon its agent for a ticket to Terre Haute, and paid him the regular price for such a ticket. By mistake, the agent gave him a ticket to Vincennes only. With this, believing it to be that for which he had asked, and without any fault or negligence upon his part, appellee boarded appellant's train, and surrendered his ticket. After passing Vincennes, the conductor demanded additional fare, as his ticket only called for Vincennes. He explained that he had bought and paid for a ticket to Terre Haute, and had given it to him, and had no money to pay additional fare. Producing neither ticket nor money, he was ejected from the train, and for this sued and recovered damages in the court below.

The case stated is such as we are required to consider established by the general verdict in appellee's favor, taken in connection with the answers to interrogatories. Construing all the averments of the complaint together, we think it was not intended to count upon the ejection of a passenger who had a ticket good upon its face, but that the gist of the complaint is, rather, the wrongful ejection of one actually entitled to be carried as a passenger upon the ticket presented. Such, we think, was evidently the construction placed upon it by both the court and parties, as indicated by the briefs and verdict and interrogatories. The case will not, therefore, fall upon the theory that there is a fatal variance, because it appears that the ticket was not good upon its face for the ride demanded.

The position of appellant's learned counsel is that the face of the ticket is conclusive as to the rights of the passenger, and that the conductor is neither required nor permitted to listen to and regard any explanations or statements by which the passenger may seek to establish a right variant therefrom. In this contention counsel are supported by the statements and decisions of courts and judges of high standing. * * *

Other authorities, however, declare that in proper cases the conductor must heed the statement and explanation of the passenger as to his rights, and that one who has requested from the company and paid for a ticket to a certain place, and who boards the train, without fault, believing he has obtained that which he sought, is entitled to ride thereon, even though the agent has not given him the proper evidence of his right to ride. * * *

Thus far we have considered decisions outside of Indiana. In our own state, however, the current of adjudications has been, from an early day, against the position assumed by appellant. Railroad Co. v. Hennigh, 39 Ind. 509; Railway Co. v. McDonough, 53 Ind. 289;

[9] The dissenting opinion of Ross, J., and parts of the opinion of Gavin, J., are omitted.

Railway Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464; Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439; Railroad Co. v. Graham, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. Rep. 256; Railway Co. v. Beckett, 11 Ind. App. 547, 39 N. E. 429. These cases establish that where a passenger surrenders his ticket to the conductor, and fails to receive any check in return, the company is liable for his ejection by a subsequent conductor in charge, to whom he refuses to pay fare or present any ticket or check entitling him to ride; so, also, where the passenger, by direction of the conductor, transfers from one train to another, upon the assurance that he can ride on the first conductor's train check, which was in fact good only for his own train; also, where the holder of a return coupon ticket receives back from the conductor the wrong coupon, which, without discovering the mistake, he presents upon the return trip. In all these instances it was held that the conductor must heed the explanation of the passenger, who was without the proper evidence of his right to ride through the mistake of the company's agent, not by reason of his own fault. * * *

Carrying out the principles underlying these decisions, we do not see how it is possible to escape the conclusion that where a passenger calls for and pays for a ticket to one place, but is, by the mistake of the company's agent, given a ticket different from that desired, with which he, without fault, boards the train believing he has the proper ticket, he is entitled to ride thereon the distance for which he has paid upon making proper explanation; and, if the conductor refuses to heed his statements, the company must respond. He has paid for his ride, and presented in good faith the only evidence given him by the company of his right to make the journey. If the company has not furnished him the proper token to convey the fact to the mind of its conductor, the blame and the consequences thereof must both rest upon the company, which is in fault, rather than upon the passenger, who is not. * * *

It is sometimes said that it is impracticable for the conductor to investigate, because, while he is doing so, the passenger may reach his destination and be gone, and the company cannot pursue him without disproportionate inconvenience and expense. To this it may be answered that this is not much more impracticable than for a passenger to pay a second time who has no more money; nor is it perhaps much more inconvenient for the company to pursue the passenger for his fare than for the passenger to go to the expense and trouble of convincing the company that its official has made a mistake, and compelling the return of the money improperly exacted. As a rule, the amount involved and the expense and trouble required would be widely disproportionate. If it be said that the conductor cannot inform himself and learn the real truth, we may answer that the opportunity is fully as good

as in any of the other cases where it is held that he must listen to and heed the passenger's explanation.

As it seems to us, every objection that may be offered to our holding, whether it be inconvenience to the company or conductor, impracticability of ascertaining the truth, or violation of the company's rules by the conductor, all are equally tenable and appropriate in these other cases. It is true these other cases are distinguishable from the one in hand, in that the facts are somewhat different, as in truth they differ from one another; yet the cardinal principle governing them is the same, and that we take to be this: The company has a right to enforce against the passenger its reasonable rules and regulations, provided his failure or inability to so do is not brought about solely by its own fault. The rule for which appellant contends is largely founded upon its supposed necessity as a requisite to the proper management of its trains; yet we have heard no general complaint of the impossibility of running trains in those states where the opposite rule has been adopted. * * *

THE BAGGAGE OF THE PASSENGER

I. What is Baggage [1]

RAILROAD CO. v. FRALOFF.

(Supreme Court of the United States, 1879. 100 U. S. 24, 25 L. Ed. 531.)

Mr. Justice HARLAN.[2] This is a writ of error to a judgment rendered against the New York Central and Hudson River Railroad Company, in an action by Olga de Maluta Fraloff to recover the value of certain articles of wearing-apparel alleged to have been taken from her trunk while she was a passenger upon the cars of the company, and while the trunk was in its charge for transportation as part of her baggage.

There was evidence before the jury tending to establish the following facts:

The defendant in error, a subject of the Czar of Russia, possessing large wealth, and enjoying high social position among her own people, after traveling in Europe, Asia, and Africa, spending some time in London and Paris, visited America in the year 1869, for the double purpose of benefiting her health and seeing this country. She brought with her to the United States six trunks of ordinary travel-worn appearance, containing a large quantity of wearing-apparel, including many elegant, costly dresses, and also rare and valuable laces, which she had been accustomed to wear upon different dresses when on visits, or frequenting theaters, or attending dinners, balls, and receptions. A portion of the laces was made by her ancestors upon their estates in Russia. After remaining some weeks in the city of New York, she started upon a journey westward, going first to Albany, and taking with her, among other things, two of the trunks brought to this country. Her ultimate purpose was to visit a warmer climate, and, upon reaching Chicago, to determine whether to visit California, New Orleans, Havana, and probably Rio Janeiro. After passing a day or so at Albany, she took passage on the cars of the New York Central and Hudson River Railroad Company for Niagara Falls, delivering to the authorized agents of the company for transportation as her baggage the two trunks above described, which contained the larger portion of the dress-laces brought with her from

[1] For discussion of principles, see Doble, Bailm. & Carr. § 197.

[2] Parts of the opinion of Harlan, J., are omitted.

Europe. Upon arriving at Niagara Falls she ascertained that one of the trunks, during transportation from Albany to the Falls, had been materially injured, its locks broken, its contents disturbed, and more than two hundred yards of dress-lace abstracted from the trunk in which it had been carefully placed before she left the city of New York.

The company declined to pay the sum demanded as the value of the missing laces; and, having denied all liability therefor, this action was instituted to recover the damages which the defendant in error claimed to have sustained by reason of the loss of her property. * * * The jury returned a verdict against the company for the sum of $10,000, although the evidence, in some of its aspects, placed the value of the missing laces very far in excess of that amount. * * *

The main contention of the company, upon the trial below, was that good faith required the defendant in error, when delivering her trunks for transportation, to inform its agents of the peculiar character and extraordinary value of the laces in question; and that her failure in that respect, whether intentional or not, was, in itself, a fraud upon the carrier, which should prevent any recovery in this action.

The circuit court refused, and, in our opinion, rightly, to so instruct the jury. We are not referred to any legislative enactment restricting or limiting the responsibility of passenger carriers by land for articles carried as baggage. Nor is it pretended that the plaintiff in error had, at the date of these transactions, established or promulgated any regulation as to the quantity or the value of baggage which passengers upon its cars might carry, without extra compensation, under the general contract to carry the person. Further, it is not claimed that any inquiry was made of the defendant in error, either when the trunks were taken into the custody of the carrier, or at any time prior to the alleged loss, as to the value of their contents. It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and consequently, of the degree of caution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without ex-

tra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies. It is also undoubtedly true that the carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by false statements, or by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it was bound to assume in consideration of the ordinary fare charged for the transportation of the person. But in the absence of legislation limiting the responsibility of carriers for the baggage of passengers; in the absence of reasonable regulations upon the subject by the carrier, of which the passenger has knowledge; in the absence of inquiry of the passenger as to the value of the articles carried, under the name of baggage, for his personal use and convenience when travelling; and in the absence of conduct upon the part of the passenger misleading the carrier as to the value of his baggage,—the court cannot, as matter of law, declare, as it was in effect requested in this case to do, that the mere failure of the passenger, unasked, to disclose the value of his baggage, is a fraud upon the carrier, which defeats all rights of recovery.

The instructions asked by the company virtually assumed that the general law governing the rights, duties, and responsibilities of passenger carriers, prescribed a definite, fixed limit of value, beyond which the carrier was not liable for baggage, except under a special contract or upon previous notice as to value. We are not, however, referred to any adjudged case, or to any elementary treatise which sustains that proposition, without qualification. In the very nature of things, no such rule could be established by the courts in virtue of any inherent power they possess. The quantity or kind or value of the baggage which a passenger may carry under the contract for the transportation of his person depends upon a variety of circumstances which do not exist in every case. "That which one traveller," says Erle, C. J., in Philpot v. Northwestern Railway Co., 19 C. B. N. S. 321, "would consider indispensable, would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind will be taken in the mind of the carrier when he receives a passenger for conveyance." Some of the cases seem to announce the broad doctrine that, by general law, in the absence of legislation, or special regulations by the carrier, of the character indicated, a passenger may take, without extra compensation, such articles adapted to personal use as his necessities, comfort, convenience, or even gratification may suggest; and that whatever may be the quantity or value of such articles, the carrier is responsible for all damage or loss to them, from whatever source, unless from the act of God or the public enemy. But that, in our judgment, is not an accurate statement of the law. Whether articles of wearing apparel, in

any particular case, constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when travelling. "The implied undertaking," says Mr. Angell, "of the proprietors of stagecoaches, railroads, and steamboats to carry in safety the baggage of passengers is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as the traveller usually carries with him for his personal convenience." Angell, Carriers, § 115.

In Hannibal Railroad v. Swift, 12 Wall. 272, 20 L. Ed. 423, this court, speaking through Mr. Justice Field, said that the contract to carry the person "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travellers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a decision of the Queen's Bench in Macrow v. Great Western Railway Co., Law Rep. 6 Q. B. 121, where Chief Justice Cockburn announced the true rule to be "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage." 2 Parsons, Contr., 199. To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier by general law is responsible as insurer. In cases of abuse by the passenger of the privilege which the law gives him, the carrier secures such exemption from responsibility, not, however, because the passenger, uninquired of, failed to disclose the character and value of the articles carried, but because the articles themselves, in excess of the amount usually or ordinarily carried, under like circumstances, would not constitute baggage within the true meaning of the law.

The laces in question confessedly constituted a part of the wearing apparel of the defendant in error. They were adapted to and exclusively designed for personal use, according to her convenience, comfort, or tastes, during the extended journey upon which she had entered. They were not merchandise, nor is there any evidence that they were intended for sale or for purposes of business. Whether they were such articles in quantity and value as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification, or comfort while travelling, was not a pure

question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases. It was for the jury to say to what extent, if any, the baggage of defendant in error exceeded in quantity and value that which was usually carried without extra compensation, and to disallow any claim for such excess.

Upon examining the carefully guarded instructions given to the jury, we are unable to see that the court below omitted any thing essential to a clear comprehension of the issues, or announced any principle or doctrine not in harmony with settled law. After submitting to the jury the disputed question as to whether the laces were, in fact, in the trunk of the defendant in error, when delivered to the company at Albany for transportation to Niagara Falls, the court charged the jury, in substance, that every traveler was entitled to provide for the exigencies of his journey in the way of baggage, was not limited to articles which were absolutely essential, but could carry such as were usually carried by persons traveling, for their comfort, convenience, and gratification upon such journeys; that the liability of carriers could not be maintained to the extent of making them responsible for such unusual articles as the exceptional fancies, habits, or idiosyncrasies of some particular individual may prompt him to carry; that their responsibility as insurers was limited to such articles as it was customary or reasonable for travelers of the same class, in general, to take for such journeys as the one which was the subject of inquiry, and did not extend to those which the caprice of a particular traveler might lead that traveler to take; that if the company delivered to the defendant in error, aside from the laces in question, baggage which had been carried, and which was sufficient for her as reasonable baggage, within the rules laid down, she was not entitled to recover; that if she carried the laces in question for the purpose of having them safely kept and stored by railroad companies and hotel-keepers, and not for the purpose of using them, as occasion might require, for her gratification, comfort, or convenience, the company was not liable; that if *any portion* of the missing articles were reasonable and proper for her to carry, and all was not, they should allow her the value of *that portion.*

Looking at the whole scope and bearing of the charge, and interpreting what was said, as it must necessarily have been understood both by the court and jury, we do not perceive that any error was committed to the prejudice of the company, or of which it can complain. * * * Judgment affirmed.

Mr. Justice FIELD, with whom concurred Mr. Justice MILLER and Mr. Justice STRONG, dissenting.

I dissent from the judgment of the court in this case. I do not think that two hundred and seventy-five yards of lace, claimed by

the owner to be worth $75,000, and found by the jury to be of the value of $10,000, can, as a matter of law, be properly considered as baggage of a passenger for the loss of which the railroad company, in the absence of any special agreement, should be held liable.

II. Liability for Merchandise Shipped as Baggage [3]

MICHIGAN CENT. R. CO. v. CARROW.

(Supreme Court of Illinois, 1874. 73 Ill. 348, 24 Am. Rep. 248.)

SCOTT, J.[4] * * * It is insisted, if property is received by a carrier without inquiry, he will be liable for its loss, whatever its value, if it is contained in such a parcel or box as to indicate its nature, or is so packed as not to mislead or deceive the carrier as to its contents, and induce him to believe it is of a different kind and of less value than it is in fact. The doctrine contended for has no application to the facts of this case. The company had no actual notice appellee's trunk contained anything other than his wearing apparel, and such articles of convenience as a passenger usually carries with him. It was brought to the company's depot with the other passengers' baggage, was checked as ordinary baggage, and was, with his knowledge and consent, placed in the common baggage car. He paid no extra compensation, nor did he bargain for any care in regard to it, other than such as it was the duty of the company to bestow upon the baggage of other travelers. There was nothing in the character of the trunk itself that indicated it contained valuable merchandise. It was such a trunk as is usually carried by commercial travelers. A person accustomed to seeing such trunks would, no doubt, recognize this as one of that class. Whether the baggageman who checked appellee's baggage had any knowledge of the use of such trunks, does not appear from anything in the evidence. He had no acquaintance with appellee, and did not know what his business was.

But, conceding it was of such weight and structure as the baggage-master must have known it was a commercial traveler's trunk, he had no reason to suspect that, in addition to the articles usually carried by a traveler, it contained valuable jewelry, comprising a stock equal, if not exceeding, in value that which is com-

[3] For discussion of principles, see Doble, Bailm. & Carr. § 198.

[4] The statement of facts and parts of the opinion are omitted.

monly kept in a retail store. Appellee presented it as ordinary baggage, and the officer of the company had the right to rely upon the representation, arising by implication, that it contained nothing else. The law imposed no obligation upon him to make any inquiry as to the contents. Had the agent of the company been informed of the contents of the trunk, or had it been so packed that the nature of its contents was discernible, and the company, with such knowledge, undertook to carry the goods, there is no reason why it would not be liable as a common carrier, and so the authorities hold. But that is not this case. The carrier in this case had no knowledge of the contents of the package, either direct or constructive. * * *

As we have seen, the fact the traveler presents a parcel as baggage, whether contained in a trunk or satchel, or other convenient mode of carrying baggage, it is upon the implied representation it contains only baggage, and the carrier is not bound to inquire as to the specific contents. There is no reason for the adoption of any other rule. No considerations of public convenience require it. By common custom the personal luggage of the traveller is carried without extra charge. Passenger carriers do not assume to carry anything as baggage except such things as may be necessary to the convenience and comfort of the traveller, and perhaps sufficient money to defray the expenses of the journey. This fact is well known to all persons who seek passage in railway carriages. With a great majority of travellers, the amount of baggage carried is of no considerable value. The companies have no arrangements for the carrying and safe keeping of costly articles. The contract is simply for passage and the usual personal baggage not exceeding in weight the amount prescribed by the regulations of the company.

If this implied contract with the carrier of passengers is to be varied, modified, or enlarged, it must be by direct notice of the contents of the package offered as baggage which, in effect, would amount to a special contract. The company may rely upon the representation that whatever is offered as baggage is that, and nothing else. The law seems to be settled that it need not inquire as to its contents. If the passenger has merchandise checked as baggage without such notice, the company cannot be held liable as a common carrier. Cahill v. L. & N. W. Ry. Co., 10 C. B. N. S. 154; Chicago & Cincinnati Air Line R. R. Co. v. Marcus, supra [38 Ill. 219]; Collins v. Boston & Maine R., 10 Cush. (Mass.) 506; Great Northern Railroad Co. v. Shepherd, 8 W. H. & G. 30; Batson v. Donovan, 4 B. & A. 21.

Upon the doctrine of these cases, it is very clear appellant was not a common carrier of the goods destroyed. Appellee gave the agents of the company no notice whatever his trunk contained valuable merchandise. No one knew better than appellee the company did not carry mer-

chandise as baggage, free of charge, and without notice of the contents of the trunk there is neither reason nor authority for holding the company liable as an insurer against loss. In Cahill v. L. & N. W. Ry. Co., supra, Willis, J., very aptly remarks that "where a passenger takes a ticket at the ordinary charge, he must, according to common sense and common experience, be taken to contract with the railway company for the carriage of himself and his personal luggage only, and that he can no more extend the contract to the conveyance of a single package of merchandise than of his entire worldly possessions." So we say in this case, it was not in the power of appellee to extend the liability of the company on account of his own convenience. There was no undertaking to carry merchandise, and he had no right to impose his goods subtilely upon the company, and then seek to make the obligation that of a common carrier. If he desired to have his merchandise or wares go upon the train with him, it was but just to the carrier he should disclose its nature and value, and if the company then chose to treat it as baggage, the liability of a common carrier would attach, but not otherwise.

The case of the Great Northern Railway Co. v. Shepherd, supra, is a case where the passenger had a quantity of ivory handles in his baggage. No notice was given, and it was not so packed as to indicate to the carrier it contained merchandise. It was decided the carrier of passengers for hire is, at common law, only bound to carry their personal luggage. Therefore, if a passenger has merchandise among his luggage, or so packed the carrier has no notice it is merchandise, he is not responsible for its loss.

The case of Cahill v. L. & N. W. Ry. Co., supra, in some of its features is like the case at bar. The plaintiff was a commercial traveler. He had checked, as baggage, a box covered with a black leather case, which had painted across the top, on each end, the word "Glass" in large white letters, and also the name of his employer in like legible letters. It contained valuable merchandise. No information was given by the plaintiff to the company's servants, nor was any inquiry made by them as to the contents of the box. It was held, in an action against the company for the loss of the box, that, inasmuch as it contained merchandise only and no personal luggage, there was no contract to carry it, and consequently it was not liable for the loss.

The case was reargued in the Exchequer Chamber, before a full bench. 13 J. Scott, 818. Cockburn, C. J., agreed with the judges of the Court of Common Pleas, if the company chose to take as ordinary baggage that which it knew to be merchandise, it is not competent, in the event of loss, to claim exemption from liability on the ground the article consists of merchandise. "But," he adds, "on the contrary, if a passenger who knows or ought to know that he is only entitled to have his ordinary personal luggage carried free of charge, choose to carry with him merchandise for which the company is entitled to charge, he

cannot claim to be compensated in respect to any loss or injury, by the company to whom he has abstained from giving notice of the contents."

The fact the box was marked "Glass" was not a circumstance, in the opinion of the court, that would charge the company with notice it contained merchandise. It could regard it as an indication it was to be handled with more than ordinary care. This case is a much stronger one than the present plaintiff's case. There was very much more to put the company on inquiry. It was ruled, however, it was not the duty of the company to inquire as to the contents of the luggage, but it was the duty of the plaintiff himself to give notice, and his failure to do so was sufficient to bar a recovery. To the same effect is the case of Belfast & Ballymena Ry. Co. v. Keys, 9 House of Lords Cases, 556. The case of Dunlap v. International Steamboat Co., 98 Mass. 371, is in entire conformity with the views expressed in the English cases. * * *

III. Interest of the Passenger in the Baggage [5]

BECHER v. GREAT EASTERN RY. CO.

(Court of Queen's Bench, 1870. L. R. 5 Q. B. 241.)

* * * In July, 1868, the plaintiff and some friends arranged to go from London to Newmarket, for the purpose of attending the races there, and they took a man-servant of one of the party to attend on them in common during their stay at Newmarket.

On the last day of the races, the servant being about to return by an early train on the defendants' line, and the plaintiff being desirous of returning later in the day, the plaintiff entrusted his portmanteau and its contents to the servant, with directions to take it up to London with him. The plaintiff gave the servant 1£. for his attention during his stay at Newmarket.

The servant accordingly proceeded to the defendants' station at Newmarket, and obtained from the defendants and duly paid them for a ticket from Newmarket to London. The servant delivered over the portmanteau with its contents and his own luggage, as well as that of the other gentlemen, to the servants of the defendants at the Newmarket station, as his ordinary luggage, and the same was received by the defendants as ordinary luggage, for the purpose of being carried by the defendants, as carriers as aforesaid, with the servant on his journey. The servant was carried by the defendants to London, but the portmanteau and its contents were lost during the journey by default of the defendants.

[5] For discussion of principles, see Dobie, Bailm. & Carr. § 199.

The plaintiff himself proceeded from Newmarket to London by a later train on the defendants' railway on the same day, and he also duly obtained and paid the defendants for his ticket for such journey, and took no luggage with him. * * *

MELLOR, J.[6] I have no doubt that no action will lie at the suit of the present plaintiff. It is clear the defendants received the portmanteau as luggage of the servant. The servant takes the ticket, and says nothing, but simply as any other passenger delivers the portmanteau with other things as his luggage, and the company's servants receive it as his luggage, to be carried as passenger's luggage. If the servant had stated when he took the ticket that the luggage belonged to the plaintiff, and that the plaintiff was coming by a later train, and the defendants' servants had received the portmanteau as the master's luggage, the case would have been very different. Here there is nothing to impose any duty or liability on the defendants beyond the relation between them and the servant of carrier and passenger, they undertaking to carry his luggage free of extra charge.

LUSH, J. What was the position of the parties here? The defendants were bound by their statute to take a certain quantity of luggage for the servant as their passenger; but if they had been informed that the portmanteau was not his luggage, they would not have been bound to take it, and in all probability they would not have taken it. It was taken as the servant's own luggage, and if any action can be maintained, it must be in the name of the servant.

Judgment for the defendants.

IV. The Passenger Accompanying the Baggage[7]

LARNED v. CENTRAL R. CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey, 1911. 81 N. J. Law, 571, 79 Atl. 289.)

Error to Supreme Court.

Action by Margaret Larned against the Central Railroad Company of New Jersey. Judgment for plaintiff, and defendant brings error.

The following is the per curiam opinion of the Supreme Court:

"The plaintiff bought a ticket from New York to Elizabeth over defendant's railroad, and used it to check her suit case, containing clothing and personal articles, to Elizabeth, about noon on a Saturday. She then, instead of going to Elizabeth immediately, went elsewhere,

[6] Parts of the statement of fact are omitted.

[7] For discussion of principles, see Dobie, Bailm. & Carr. § 200.

and took a train for Elizabeth on that evening. * * * We are unable to accede to the view that, because plaintiff did not accompany her baggage, the relation was not originally that of carrier and passenger so as to charge the company as a carrier of the baggage. It is true that many of the older authorities so hold, but the methods of railroad companies in the transportation of baggage have changed greatly of late years, even to the extent of running trains exclusively for baggage; and it is notorious in many cases, especially at certain seasons, the passenger has no assurance whatever that his baggage will go on the same train as that which he takes himself, even when checked in due season for that purpose. 'Baggage may be checked from house at starting point to another house at place of destination, and be transported quite independently of the train taken by the passenger. We think, therefore, that a railroad which checks baggage on a passage ticket and thereby assumed entire control of it takes it primarily as a carrier; and the mere fact that the passenger does not take the same train as the baggage does not modify or change this status.'" * * *

PER CURIAM.[8] We are content with the reasoning adopted by the Supreme Court in this case. * * * The judgment under review should be affirmed.

V. The Passenger's Custody of the Baggage[9]

THE HUMBOLDT.

(District Court of the United States, D. Washington, N. D., 1899. 97 Fed. 656.)

This is a suit by a passenger on the steamship Humboldt to recover damages for the loss of his valise and its contents while traveling on said steamer. Heard on exceptions to the libel. Exceptions sustained.

HANFORD, District Judge. The libelant, having paid for a ticket which entitled him to transportation from Seattle to Skagway, and the use of a state room and meals while en route, went on board just before the time appointed for the voyage to begin, and placed his valise within the state room assigned to him, and it was stolen therefrom. The libel does not charge any special act of negligence on the part of the carrier, nor that the custody of the valise was surrendered by the libelant to the officers or servants of the vessel. The rule

[8] Parts of the opinion of the Supreme Court and part of the per curiam opinion of the Court of Errors and Appeals are omitted.

[9] For discussion of principles, see Dobie, Bailm. & Carr. § 201.

seems to be well settled that, in general, a carrier is not liable for the loss of a passenger's baggage, where the loss is not occasioned by some particular breach of duty or negligence on the part of the carrier's servants, unless the baggage has been delivered to and taken into the exclusive custody of the carrier's servants; but it is held by respectable authorities that, where the carrier is a steamship company, the liability of an innkeeper is assumed by its contract with passengers who pay for rooms and meals as well as for transportation. I find, however, that the latest decisions of the American courts, and the preponderance in weight of authorities and reason, is against this exception to the general rule. A steamship company is not permitted to choose whom it will serve, but must afford accommodations to all who pay fare. A passenger ship is necessarily accessible to all classes of travelers, and is so far a public place that it is unreasonable to impose upon the owners the burden of liability for thefts of the private baggage of passengers, unless the baggage has been delivered to, and left in the exclusive control of, the carrier's officers or servants. The R. E. Lee, Fed. Cas. No. 11,690; 3 Am. & Eng. Enc. Law (2d Ed.) 547–552, note 3.

In my opinion, the facts alleged are not sufficient to create a legal liability either by contract or by the commission of a tort. Exceptions sustained.

VI. Negligence of the Passenger Contributing to the Loss of the Baggage [10]

WHITNEY v. PULLMAN PALACE CAR CO.

(Supreme Judicial Court of Massachusetts, 1887. 143 Mass. 243, 9 N. E. 619.)

MORTON, C. J.[11] The plaintiff bought of the Eastern Railroad Company a ticket which entitled her to ride from Boston to the White Mountains in a day parlor car, owned by the defendant, and in use by the Eastern Railroad Company, under a contract with the defendant. She had with her a small satchel or reticule, which she did not deliver to the defendant, or any of its agents, but which she kept in her personal control. There was evidence tending to show that it was stolen while the train was stopping at Portsmouth for refreshments. It is clear that she cannot hold the defendant liable as a common carrier. She can only hold it liable upon the ground that her property was lost by some negligence of the defendant, and without any fault on her

[10] For discussion of principles, see Dobie, Bailm. & Carr. § 201.

[11] The statement of facts is omitted.

part. Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456; Kinsley v. Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200. We are of opinion that, upon the evidence, the plaintiff fails to show the exercise of due care on her part. When the train stopped at Portsmouth, she and her husband left the car for 10 minutes, leaving her reticule upon the sill of one of the car windows, a conspicuous and exposed place, which could be reached from the outside through an adjoining window, which was open. This was not the exercise of common prudence, or proper care of her property, and thus her own negligence contributed to the loss.

This is decisive against her right to recover, and we need not consider the question whether there is any evidence of negligence on the part of the defendant; nor is it necessary to consider whether the liability of the defendant is different from that of a railroad using its own cars. Exceptions overruled.

ACTIONS AGAINST CARRIERS OF PASSENGERS

I. The Measure of Damages in Actions for Personal Injuries[1]

VAN DE VENTER v. CHICAGO CITY RY. CO.

(Circuit Court of the United States, N. D. Illinois, 1885. 26 Fed. 32.)

BUNN, J.[2] (charging jury). This action is brought by the plaintiff, Eugenia Van de Venter, a citizen of the city of Buffalo, in the state of New York, against the defendant, the Chicago City Railway Company, a corporation organized under the statutes of the state of Illinois, and a citizen of the state of Illinois, to recover for a personal injury, claimed to have been received by her through the defendant's negligence and want of proper care while the plaintiff was attempting to take one of the defendant's cars. * * *

If you find for the plaintiff, the sources of the damages will be—First, the expenses necessarily and properly incurred by her in procuring medical aid and attendance, and for nursing, in consequence of the injury, to be assessed and found by the jury from the evidence; second, if you find the plaintiff was disabled by the injury, from attending to her ordinary business and occupation, compensation for her loss of time so occasioned by the injury, to be assessed and found by the jury from the evidence; third, the personal pain and suffering, physical and mental, to which the plaintiff has been subjected as a consequence of the injury, to be assessed by the jury from the testimony. The damages which the plaintiff would be entitled to recover under this last head, in case you find for the plaintiff, are largely in the discretion of the jury, but they should be proportioned as near as can be to the extent of the pain and suffering endured by the plaintiff as a consequence of the injury. They should in no case be excessive in amount, but made judiciously commensurate, in the sound judgment and discretion of the jury, to the pain and suffering, physical and mental, so endured by the plaintiff as a consequence of the injury. * * *

[1] For discussion of principles, see Doble, Bailm. & Carr. § 207.

[2] Parts of the opinion are omitted.

RICKETTS v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia, 1890. 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. Rep. 901.)

SNYDER, P.[3] Action of trespass on the case, commenced on July 19, 1886, in the circuit court of Wayne county, by G. C. Ricketts, against the Chesapeake & Ohio Railway Company, for damages alleged to have been sustained by the plaintiff by reason of an assault committed upon him by an employé of the defendant. * * *

The plaintiff in error was not prejudiced either by the refusal or the giving of any of the instructions, unless there was error in the giving of the following: "The court instructs the jury that if they find the defendant guilty, they are, in estimating the damage, at liberty to consider the health and condition of the plaintiff before the injury complained of, as compared with its present condition, in consequence of said injuries, and whether said injury is in its nature permanent; and the reasonable expense incurred by the plaintiff, if any, in curing, or endeavoring to cure, the injuries he received; also, the damages suffered, if any, from the loss of time and inability to attend to business, resulting from the injuries received; also, the bodily and mental pain and suffering, if any, resulting from the injuries received, and for the outrage and indignity put upon him, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which the plaintiff has sustained." * * *

It seems to me that there is no valid objection to all that part of said instruction. * * *

SLOANE et al. v. SOUTHERN CAL. RY. CO.

(Supreme Court of California, 1896. 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.)

HARRISON, J.[4] * * * Evidence was given at the trial tending to show that Mrs. Sloane had been previously subject to insomnia, and also to nervous shocks and paroxysms, and that, owing to her physical condition, she was subject to a recurrence of these shocks or nervous disorder if placed under any great mental excitement; and that, by reason of the excitement caused by her exclusion from the car, there had been a recurrence of insomnia and of these paroxysms. * * *

The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible

[3] Parts of the opinion have been omitted.

[4] Parts of the opinion have been omitted.

to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.

This subject received a very careful and elaborate consideration in the case of Bell v. Railway Co., L. R. 26 Ir. 428. Mrs. Bell was a passenger upon one of the defendant's trains, and by reason of the defendant's negligence in the management of its train suffered great fright, in consequence of which her health was seriously impaired. She had previously been a strong, healthy woman, but it was shown that, after this occurrence, she suffered from fright and nervous shock, and was troubled with insomnia, and that her health was seriously impaired. The jury were instructed that if, in their opinion, great fright was a reasonable and natural consequence of the circumstances in which the defendant by its negligence had placed her, and that she was actually put in fright by those circumstances, and if the injury to her health was, in their opinion, the reasonable and natural consequence of such great fright, and was actually occasioned thereby, the plaintiff was entitled to recover damages for such injury. It was objected to this instruction that, unless the fright was accompanied by physical injury, even though there might be a nervous shock occasioned by the fright, such damages would be too remote. In holding that this objection was not well founded, and that the nervous shock was to be considered as a bodily injury, the court held that, if such bodily injury might be a natural consequence of fright, it was an element of damage for which a recovery might be had, and, referring to the contention of the defendant, said: "It is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particu-

lar structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation cannot in law exist in the case of a similar act producing upon the same structures an effect which at a subsequent time—say a week, a fortnight, or a month—must result without any intervening cause in the same physical injury. As well might be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration." At the close of its opinion, Lord Chief Baron Palles says: "In conclusion, I am of the opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down as a matter of law that, if negligence cause fright, and such fright in its turn so affect such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury accompanied such negligence in point of time." This case is quoted at great length and with approval in the eighth edition of Mr. Sedgwick's treatise on Damages, at section 860. Mr. Beven, in the recent edition of his work on Negligence (volume 1, pp. 77–81), also comments upon it with great approval.

In Purcell v. Railroad Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203, the defendant so negligently managed one of its cars that a collision with an approaching cable car seemed imminent, and was so nearly caused that the attendant confusion of ringing alarm bells and of passengers rushing out produced in the plaintiff, who was a passenger on the car, a sudden fright, which threw her into convulsions, and, she being then pregnant, caused in her a miscarriage, and subsequent illness. The court held that the defendant's negligence was the proximate cause of the plaintiff's injury, and that it was liable therefor, even though the immediate result of the negligence was only fright, saying: "A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system." See, also, Canning v. Inhabitants of Williamstown, 1 Cush. (Mass.) 451; Seger v. Town of Barkhamsted, 22 Conn. 290; Car Co. v. Dupre, 4 C. C. A. 540, 54 Fed. 646; Stutz v. Railroad Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769; Razzo v. Varni, 81 Cal. 289, 22 Pac. 848. "It is a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even though the harm done consists mainly of nervous shock." Warren v. Railroad Co., 163 Mass. 484, 40 N. E. 895.

The mental condition which superinduced the bodily harm in the foregoing cases was fright, but the character of the mental excitation by which the injury to the body is produced is immaterial. If it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which

caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury. Whether the indignity and humiliation suffered by Mrs. Sloane caused the nervous paroxysm, and the injury to her health from which she subsequently suffered, was a question of fact, to be determined by the jury. There was evidence before them tending to establish such fact, and if they were satisfied, from that evidence, that these results were directly traceable to that cause, and that her expulsion from the car had produced in her such a disturbance of her nervous system as resulted in these paroxysms, they were authorized to include in their verdict whatever damage she had thus sustained. Whether the defendant or its agents knew of her susceptibility to nervous disturbance was immaterial. She had the same rights as any other person who might become a passenger on its road, and was entitled to as high degree of care on its part. It was not necessary that this injury should have been anticipated in order to entitle her to a recovery therefor. * * *

II. Measure of Damages in Actions Other than for Personal Injuries [5]

CARSTEN v. NORTHERN PAC. R. CO.

(Supreme Court of Minnesota, 1890. 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. Rep. 589.)

VANDERBURGH, J. The defendant in August, 1888, issued excursion passenger tickets from Detroit, in this state, "to Minneapolis and return," to be used within a time limited, but without restrictions as to transfer. The plaintiff purchased one of these tickets at second-hand of a railway ticket broker, and, in conformity with the usage of the company, had it stamped by the defendant's agent at the depot in Minneapolis, and thereupon presented it to the baggageman, who punched it and checked his baggage, and within the time limited plaintiff took passage on a regular passenger train from Minneapolis to Detroit. While on the way, and before reaching Brainerd, an intermediate station, his ticket was examined by an agent of the company, who is styled a "ticket exchanger," and acted as an assistant to the regular conductor, and who notified the plaintiff that his ticket was not good, on the ground stated by him that it was bought at a "scalper's office." He, however, took up and retained the ticket, and refused to return it to the plaintiff. The regular conductor soon after

[5] For discussion of principles, see Doble, Bailm. & Carr. § 208.

came along and demanded plaintiff's fare, and when informed what had been done by the exchanger also stated that the ticket was not good, and notified him that he would have to leave the train unless he paid his fare; and soon after came back accompanied by two brakemen as the train was approaching a station, for the purpose, as the evidence tends to show, of ejecting plaintiff from that train. They took him by the shoulder and led him to the door in presence of the passengers, when a stranger paid his fare to Brainerd, at which place the plaintiff voluntarily left the train. Plaintiff acted under compulsion when leaving his seat when ordered, but made no resistance, and there was in fact no violence or vindictive or abusive language used.

1. The evidence is sufficient to show that the ticket was genuine and was good for one passage from Minneapolis to Detroit as a return ticket, and that it was wrongfully taken away from plaintiff and appropriated by the agent of the defendant. The ticket was transferable in the absence of any restrictions in the original contract of sale, and was valid in plaintiff's hands. The conductor was fully advised of the facts in the case, which he could verify by reference to his assistant on the same train. His conduct in requiring the plaintiff to leave the train was therefore wrongful. Burnham v. Railroad Co., 63 Me. 303, 18 Am. Rep. 220.

2. It is an action sounding in tort, and we think the plaintiff entitled to claim damages for the wrong and injury done him in addition to the price of the ticket, though no particular loss or special injury to his person was shown. The evidence tended to prove that the agents of the defendant laid hands on him, and were proceeding to eject him by force, if necessary, from the car, which was full of passengers. The fact that he escaped personal violence by non-resistance does not deprive him of his right of action; and the jury were entitled to consider, in connection with the physical acts of the conductor in wrongfully attempting to eject him, the annoyance, vexation, and mortification suffered by him, and the indignity put upon him. Railroad Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133; 3 Suth. Dam. 712, 715; 2 Beach, Ry. Law, § 891. But the jury must be governed by the evidence, and the damages assessed must be appropriate to the nature of the case, which will be modified by the circumstances, such as the presence or absence of personal malice, actual violence, and threatening or insulting language. Railroad Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562, 573. The instruction given by the court to the jury that if the conductor took up the ticket, and failed to give any excuse for his refusal to return the same to plaintiff, and no excuse existed, they might presume that he acted malevolently, and with a tyrannical and oppressive motive, and might award him "any amount of damages that is proper not exceeding the sum of $1,000," was, we think, in view of the evidence in the case, erroneous, and likely to mislead the jury as to the extent of their discretion on the question of damages.

3. The plaintiff was permitted, against the objection of the defendant, to prove that, by reason of his delay at Brainerd, he lost a job of threshing at Detroit, for which he expected $2.25 per day. He testified that he was detained there for a week for want of money to go any further, and this alleged loss the jury were allowed to consider. This was error. Such damages are too remote. They cannot be considered the proximate result of the alleged wrongful act of the conductor. There must have been several other independent causes to which the same result might have been referred. Brown v. Cummings, 7 Allen (Mass.) 508. Order reversed.

III. Exemplary or Punitive Damages[6]

LEXINGTON RY. CO. v. COZINE.

(Court of Appeals of Kentucky, 1901. 111 Ky. 799, 64 S. W. 848, 98 Am. St. Rep. 430.)

BURNHAM, J.[7] This action was instituted by plaintiff against the defendant to recover damages for a malicious assault made upon him by one of the defendant's employés in the course of his employment. It is alleged by plaintiff that he was a passenger on one of defendant's cars, and had paid the usual fare; that the defendant's conductor in charge of the car, without provocation, wantonly and maliciously assaulted, beat, and bruised him. * * *

The facts attending the assault, as testified to by a number of witnesses, were substantially as follows: Plaintiff boarded defendant's car, paid his fare, and requested to be let off at the Lexington Laundry. As the car approached the laundry, plaintiff signaled to the conductor to stop. Failing to attract his attention, he reached up to pull the bell cord, but by mistake got hold of the wrong cord, and rung up a fare. The conductor thereupon came back and asked what he rang the bell for, and said, "You owe me a nickel." Plaintiff responded, "I have already paid you, but I will give you another nickel," and shoved it along the seat, and at the same time arose for the purpose of alighting. The car, however, did not stop, and he remarked to the conductor, "If you do not stop the car, I will ring the bell again." At the time he said this he was holding to the side of the car with both hands, and standing on the footboard. The conductor responded, "No, damn you! you wont," and immediately struck him twice in the face, bruising one eye and cutting a gash in his face. Plaintiff was a cripple, and

[6] For discussion of principles, see Doble, Ballm. & Carr. § 209.

[7] Parts of the opinion are omitted.

partially paralyzed in both legs from the knees down, and was making no effort at all to assault or otherwise injure the conductor. * * *

The third instruction defined the measure of compensation and further told the jury that, if they believed from the evidence that the assault made upon the plaintiff was inspired by malice on the part of said Lloyd towards the plaintiff, they might allow the plaintiff punitive damages, by way of punishment. It is contended by appellant that, as the reply failed to deny the averment of the answer that the assault by the defendants' conductor "was made without their knowledge or assent," the court erred in the third instruction, in allowing the jury to impose punitive or exemplary damages because of the malice of their conductor; in other words, that the court, under the pleadings and facts of the case, erred in submitting to the jury the question of punitive damages at all.

There is perhaps no question of law in which there has been greater diversity of opinion by courts of last resort than whether a corporation is liable for exemplary damages for the unauthorized malicious acts of its agents or servants, committed in the course of their employment. The doctrine of the federal courts upon this question, as settled by recent decisions of the supreme court of the United States, is: "First, that a corporation is not liable to exemplary damages except where a natural person would be liable to such damages for a similar act done by his agent or servant; second, that a natural person is not generally liable for such damages except where he has commanded the doing of the oppressive act, or subsequently ratified it." See Railroad Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. The opinion, however, concedes that corporations may be liable to exemplary damages for the act of an agent within the scope of his employment, provided the criminal intent necessary to warrant the imposition of such damages is brought home to the corporation. And this rule of the federal courts is in accord with the principle announced by a number of state courts in passing upon the question. But, on the other hand, a great majority of the American state courts hold that a corporation is liable in exemplary damages for the willful, malicious, oppressive, insulting, or fraudulent act of its servant, although it had not precisely authorized or subsequently ratified it, if the act was committed by the servant in the course of his employment, and while acting within the scope of his authority. See Hutch. Carr. § 815a, and 5 Thomp. Corp. § 6338.

In discussing this question, Mr. Wood, in his work on Railroads (section 317, p. 1417), says: "It was at one time regarded as improper to hold the principal liable for the willful or malicious acts of his agents, and consequently exemplary damages were not recoverable against a corporation for the act of its servants unless it was shown that it authorized or had ratified the act. But, since it is now almost universally held that the master is liable for the willful and even malicious acts of his servant in the line of his duty, the rule which is now

generally held in the better class of cases, that exemplary damages may be given against a corporation for injuries inflicted by its servant willfully or maliciously, and whether authorized or ratified by it or not, seems to us to be consistent and just, especially when the action is for personal injuries received by a passenger to whom the company owes a contract duty, and in some of the states such damages are provided for by statute." The rule laid down by Sutherland is: "If a corporation like a railroad company is guilty of an act such as in the case of an individual would subject him to exemplary damages, they would be equally liable to such damages. And when the servants of the corporation engaged in the carriage of passengers are guilty of such acts or conduct in the performance of their duties, in the transportation of the injured party as a passenger, as would subject them to damages of this nature, the corporation is also liable to punitive damages, without proof that they directed or ratified such acts or conduct." See Suth. Dam. p. 271. Pierce, R. R. § 305, says: "Although compensation for the injury is the usual measure of damage, other damages in addition have been allowed where the author of the injury committed it maliciously, willfully, or even recklessly, or, according to some authorities, with gross carelessness. Such supplementary damages are called 'exemplary.'"

Time does not permit, nor is it needful, that we should undertake to cite the numerous cases in which this rule has been followed in other states. It is sufficient to say that it is too firmly grounded in the jurisprudence of this state to be now questioned. It has been emphatically approved in Railroad Co. v. Ballard, 85 Ky. 311, 3 S. W. 530, 7 Am. St. Rep. 600; Same v. Mitchell, 87 Ky. 327, 8 S. W. 706; Same v. Long, 94 Ky. 410, 22 S. W. 747,—and in numerous other cases. And while there is nothing in this record to show that appellants either authorized or approved the conduct of their conductor in this transaction, yet he was clearly acting in the line of his employment at the time of his brutal and unjustifiable assault upon a passenger who was entitled to his care and protection, and the case is clearly brought within the rule of law which authorized the instruction complained of.

Judgment affirmed.

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